Supreme Court, U.S.
F D

No. 03-291

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In The
Supreme Court of the United States

FREDERICK E. BOUCHAT,
Petitioner,

v.

BALTIMORE RAVENS FOOTBALL CLUB, INCORPORATED, a/k/a Baltimore Ravens, Incorporated; NATIONAL FOOTBALL LEAGUE PROPERTIES, INCORPORATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

THE SECOND SENTENCE OF SECTION 504(b) OF THE COPYRIGHT ACT OF 1976 PROVIDES: "IN ESTABLISHING THE INFRINGER'S PROFITS, THE COPYRIGHT OWNER IS REQUIRED TO PRESENT PROOF ONLY OF THE INFRINGER'S GROSS REVENUE, AND THE INFRINGER IS REQUIRED TO PROVE . . . THE ELEMENTS OF PROFIT ATTRIBUTABLE TO FACTORS OTHER THAN THE COPYRIGHTED WORK."

1. WHETHER, IN ORDER TO CREATE A TRIABLE ISSUE OF FACT AS TO AN APPORTIONMENT OF A COPYRIGHT INFRINGER'S PROFITS, THE COPYRIGHT OWNER WHO PRESENTS PROOF OF AN "INFRINGER'S GROSS REVENUE" RELATED TO USE OF THE COPYRIGHTED WORK IS ALSO REQUIRED TO PRESENT PROOF THAT THE INFRINGING USE ENHANCED THE "INFRINGER'S GROSS REVENUE."

2. WHETHER A COPYRIGHT OWNER IS ENTITLED TO A JURY INSTRUCTION ON APPORTIONMENT UNDER 17 U.S.C., § 504(b) IN ORDER TO ALLOW THE JURY TO DETERMINE WHETHER AND TO WHAT EXTENT APPORTIONMENT OF PROFITS IS REASONABLE UNDER THE CIRCUMSTANCES OF THE CASE.

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Petitioner, Frederick E. Bouchat, petitions the Supreme Court of the United States to grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered on October 8, 2003. (Petitioner's Appendix ("Pet. App.") 1a).

REFERENCE TO OPINIONS BELOW

The split decision and opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514 (4th Cir. 2003)(Pet. App. 1a); Supplemental Memorandum and Order, entered February 1, 2002, reported as *Bouchat v. Baltimore Ravens, Inc.*, 215 F. Supp. 2d 611 (D. Md. 2002) (Pet. App. 57a); Corrected Memorandum and Order of October 5, 2001, entered February 1, 2002, also reported as *Bouchat v. Baltimore Ravens, Inc.*, 215 F. Supp. 2d 611 (D. Md. 2002) (Pet. App. 63a). The decision of the Court of Appeals affirming on interlocutory appeal the finding of copyright infringement is reported as *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350 (4th Cir. 2000), *cert. denied*, 532 U.S. 1038 (2001). (Pet. App. 81a).

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Fourth Circuit for which Petitioner seeks review was entered on October 8, 2003. (Pet. App. 1a). On October 21, 2003, Petitioner filed a Petition for Rehearing with Petition for Rehearing *En Banc*, which was denied by an order filed on December 9, 2003. (Pet. App. 113a).

Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1338(a), in that Petitioner, Frederick E. Bouchat, filed a civil action for copyright infringement under the copyright laws of the United States, i.e., 17 U.S.C. § 501 *et seq.* Petitioner invoked the jurisdiction of the Court of Appeals pursuant to 28 U.S.C. § 1291.

STATUTE INVOLVED IN THE CASE

Title 28, U.S.C. § 504(b):

> (b) Actual damages and profits. The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(Pet. App. 115a).

STATEMENT OF THE CASE

In November, 1995, the Cleveland Browns football franchise announced its intention to move to Baltimore, resulting in a public outcry in Baltimore and

Cleveland, as well as nationally, about the move of one of the National Football League's most fabled and supported franchises, and created a new identity to be known as the Baltimore Ravens. Because of the manner in which the Baltimore Colts had relocated to Indianapolis in 1984, as well as the relocation of other NFL teams, the franchise had particularized marketing needs to identify with the City. *See* Jon Morgan, *Glory for Sale--Fans, Dollars and the New NFL* (Bancroft Press 1997).

The objective of Respondents National Football League Properties, Inc. ("NFLP") and Baltimore Ravens Football Club, Inc. was to create a logo with which the people of Baltimore could identify and which would also meet the needs of Respondents' sponsors, broadcast and media licensees, manufacturers of consumer merchandise and publishers of game day program magazines (collectively "licensees"). (Pet. App. 154-59a, 178-81a). NFLP's design team was under extreme pressure to meet the tight deadlines imposed by the kick-off of the 1996 season, when Respondents copied Petitioner's work (Pet. App. 83-84a, 86-88a & n.A1, 157-59a, 255-56a), disregarding Petitioner's name and copyright © notice. (Pet. App. 88a, 255-56a). Respondents' infringing work is virtually an identical copy of Petitioner's work. (Pet. App. 64-65a, 88a & n.A1).

Respondents used the infringing work in two types of revenue-producing activities. The first involved lines of revenue from Respondents' licensees who paid money in exchange for a bundle of rights that included use of the infringing work. (Pet. App. 3a, 16a, 59a, 65a, 168-70a, 186-93a, 225-54a). The second

type of revenue-producing activity involved the Ravens' use of the infringing work as the centerpiece of the Ravens' advertising and marketing activities to sell tickets and related seat and admission licenses. (Pet. App. 3a, 16a, 65a, 168-70a, 183-85a, 194-214a).

At the onset of the case, the District Court bifurcated the case between liability and damages and stayed discovery concerning damages. On November 3, 1998, a jury returned a verdict in favor of the Petitioner, finding that Respondents had infringed Petitioner's copyright. Discovery concerning damages remained stayed while Respondents appealed. The Court of Appeals affirmed. (Pet. App. 81a).

The case returned to the District Court. The District Court opened discovery concerning profits attributable to consumer merchandise but continued the stay concerning other lines of revenue, pending rulings on Respondents' prospective motions for partial summary judgment concerning certain revenue streams. (Pet. App. 145a, 215-21a ; Paper No. 176, 5/2/01; Proceedings before the Magistrate Judge, June 7, 2001, tr. 3-6). Petitioner sought an apportionment of the infringers' profits pursuant to 17 U.S.C. § 504(b), but did not seek actual or statutory damages.

Respondents filed a motion for partial summary judgment during the preliminary stages of discovery concerning profits and supported their motion with the affidavits of their executives and their licensees who professed that, in their experience, they never knew the design of any team logo to impact on revenues and that the infringing logo was not a factor in the decision of the respective licensees to become or remain licensees.

(Pet. App. 223-54a). Petitioner countered with evidence that Respondents used the selection and arrangement of the design elements of Petitioner's work (its originality) as an advertising tool to visually communicate a particular commercial image and message to connect with fans. It was used as the centerpiece of the Ravens' marketing activities for the purpose of increasing Respondents' own revenue and the revenue of their licensees, and thereby Petitioner's design, apart from being purely artwork, had commercial value and utility to the Respondents.[1] (Pet. App. 149-214a). Petitioner also filed affidavits pursuant to Fed.R.Civ.P. 56(f) requesting discovery (Pet. App. 151a, 215-22a), as well as a subsequent motion for discovery. (Paper No. 198, 9/19/01).

The District Court ruled that "even to the extent that a Plaintiff can shift the burden of proof by showing gross receipts from activities *related* to the infringement, a Defendant may still be entitled to summary judgment," if the infringement "could not reasonably be found to have affected the amount of revenue obtained from an activity." (Pet. App. 58a, 68a, 73a). The Court held as a matter of law that Petitioner's work had no "material" or "commercial" value other than what Respondents gave it through their use of Petitioner's work in conjunction with Respondents' business goodwill and the name "Ravens," except for the work's aesthetic features "sans

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1 Petitioner's evidence included a detailed affidavit of a Professor of Identity Design (Pet. App. 162-77a), which was supported by the statements made by Respondents' executives (Pet. App. 171a, 178-81a) and approximately 356 examples of Respondents' marketing use of the infringing work. Some of the 356 examples are excerpted in the Appendix. (Pet. App. 183-214a).

the name 'Ravens'." (Pet. App. 70-71a & n.9). The District Court did not address Petitioner's evidence (Pet. App. 149-214a) and focused on the aesthetics of the artwork as an inducement to purchase, noting that there was no evidence that anyone purchased a game ticket, a personal seat license or season tickets or paid for a broadcast right because of the use of the infringing logo "as distinct from merely using the name of the team." (Pet. App. 72-73a, 77a). The District Court thereby granted partial summary judgment in favor of the Respondents as to all lines of revenue, except for revenue from consumer merchandise, while the Court reserved as to revenue from sponsors. (Pet. App. 77-78a, 80a). The District Court ruled solely on the basis that Petitioner did not present evidence or proffer facts that would establish that Petitioner's logo design affected any revenues and expressly did not rely on any affidavits or evidence submitted by Respondents. (Pet. App. 78-79a).

The District Court subsequently granted summary judgment after limited discovery (Pet. App. 145-46a) as to revenue from sponsors: "there is no reasonable possibility that any of this revenue could have been affected by the aesthetic features of" the infringing logo and "[t]he evidence, and common sense, establish beyond reasonable debate, that no part of the amount paid by the sponsors for the use of the [infringing logo] . . . (or any other team logo) was attributable to anything other than the team name and the goodwill associated therewith." (Pet. App. 59a). Subsequently, on the same ground, the District Court granted Respondents' motion as to revenue from publication of game day program magazines and the

sale of video games and trading cards (Pet. App. 50-51a), leaving for trial only revenue from the sale of souvenir cups and consumer merchandise bearing the infringing logo.

At trial, which was tried to a different jury than the issue of liability, the District Court made the following rulings based on its prior partial summary judgment that Respondents gave the infringing work all of its commercial value (Pet. App. 70-71a & n.9): (1) excluded evidence of, and prohibited reference to, the commercial value of Petitioner's work to Respondents; (2) restricted the issue at trial as to what extent the decision to purchase products bearing the infringing work was induced by the attractiveness of the infringing logo as artwork (Pet. App. 118a, 125-26a, 132-33a); (3) refused to instruct the jury concerning apportionment under § 504(b) and limited substantive jury instructions to an explanation of the special verdict form and the burden of proof (Pet. App. 25-30a, 118-20a, 123-27a); and (4) would not allow the jury to know the background facts of the case or that there had been a finding of copyright infringement, or even to know that this was a copyright case–or even to see Petitioner's work.[2] (Pet. App. 83-84a, 118-119a, 128-37a). The jury returned a special verdict in favor of Respondents. (Pet. App. 118a). The District Court entered a final judgment that Respondents infringed but that Petitioner was entitled to no monetary recovery. (Pet. App. 47a).

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2 The Court declined Petitioner's repeated requests that the Court provide the jury a statement in accordance with the facts found in the Court of Appeals' decision on liability. (Pet. App. 128-30a, 134-37a). The District Court gave the jury its only background information about the case prior to opening statements. It is reproduced in the Appendix. (Pet. App. 131-33a).

The Fourth Circuit affirmed, holding:

> Once the . . . [infringers] had carried their initial burden of demonstrating the absence of any genuine issue of material fact regarding the attributability of the contested revenues, . . . [the copyright owner] could survive the motion for summary judgment only by adducing specific, nonspeculative evidence supporting the existence of a link between the infringement and the . . . [infringers'] supposedly enhanced revenues.

(Pet. App. 23a). The Court of Appeals did not address, other than to characterize as speculative (Pet. App. 20a, 22a), the evidence Petitioner submitted in opposition to the motions for partial summary judgment (Pet. App. 149-214a) that his work added commercial value and utility to the infringing work, separate and apart from its attractiveness as artwork. Instead, the Court of Appeals simply focused on the attractiveness of the artwork as an inducement for businesses and individuals to purchase sponsorship and broadcast rights, game tickets, trading cards and video games.[3] (Pet. App. 19a, 22a & n.10). The Court also held that a jury instruction solely on the burden of proof was a sufficient statement on the copyright law. (Pet. App. 23-25a). Judge Widener dissented on the ground that

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[3] The decision suggests that Petitioner did not respond to the motion concerning profits from trading cards, video games and game day magazines. (Pet. App. 22a & n.10). The record clearly reflects that Petitioner responded. (Paper No. 260, 5/31/02)(Pet. App. 139-44a).

the District Court failed to adequately instruct the jury on the apportionment of an infringer's profits. (Pet. App. 25-31a).

REASONS FOR GRANTING WRIT

Petitioner calls upon the Court to resolve the conflict among the Circuits concerning the statutory formula for apportionment of a copyright infringer's profits contained in the second sentence of 17 U.S.C. § 504(b), given the importance of apportionment to the copyright law. The decision of the Fourth Circuit conflicts in principle with this Court's decisions that have been codified into § 504(b) and rewrites the statutory formula for apportioning the profits of a copyright infringer. The decision ignores the statute's plain meaning and its statutory purpose of preventing an infringer from unfairly benefiting from an infringement. The decision represents judicial policy-making that alters the statutory balance to favor infringers, deters the creative activity of authors and inventors and stifles economic competition.

THE APPORTIONMENT OF AN INFRINGER'S PROFITS IS IMPORTANT TO THE APPLICATION OF THE COPYRIGHT LAW, AND THE COURT HAS NOT ADDRESSED APPORTIONMENT UNDER THE COPYRIGHT ACT OF 1976, WHICH CODIFIED THE COURT'S DECISION IN *SHELDON V. METRO-GOLDWYN PICTURES CORP.*, 309 U.S. 390.

The Copyright Act effectuates Article I, § 8, cl. 8 of the Constitution and "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public

access to the products of their genius after the limited period of exclusive control has expired." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). The Court last specifically addressed the principles governing the apportionment of a copyright infringer's profits in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), a case under the Copyright Act of 1909 that affirmed the apportionment analysis of Judge Learned Hand. The Court granted certiorari "[i]n view of the importance of the question . . . in the application of the copyright law." *Sheldon*, 309 U.S. at 396-97. Subsequently, in *dicta*, the Court cited *Sheldon* with approval in a post-1976 Act case involving fair use, as holding "that an infringer who commingles infringing and noninfringing elements 'must abide the consequences, unless he can make a separation of the profits so as to assure to the injured party all that justly belongs to him.'" *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 567 (1985) (*quoting Sheldon*, 309 U.S. at 406). Prior to *Sheldon*, the Court had addressed the apportionment of an infringer's profits in two instances arising under the common law: *Callaghan v. Myers*, 128 U.S. 617 (1888)(holding the entire profits realized by the infringer will be awarded to copyright owner when the infringer does not carry its burden of disentangling the contributions of several factors contributing to infringer's profits); *Belford, Clarke & Co. v. Scribner*, 144 U.S. 488, 508 (1892)(reaffirming *Callaghan*).

Title 17 U.S.C. § 504 (Pet. App. 115a) was enacted as part of the Copyright Act of 1976, the first comprehensive revision of the copyright law since the 1909 Act. The second sentence of § 504(b) represents a

codification of the Court's decision in *Sheldon*. *Data General v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1176 (1st Cir. 1994); *see also* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 14.03[C], at 14-46 (2003); II Paul Goldstein, *Copyright*, §12.1.2.2, at 12:26 to 12:27 (2d ed. 1996). Section 504 is "the cornerstone of the remedies sections and of the . . . [Copyright Act of 1976] as a whole." H.R. Rep. No. 94-1476 at 161 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5777.

THE CIRCUITS ARE IN CONFLICT WITH AND CONFUSION ABOUT WHETHER THE PROOF OF THE INFRINGER'S REVENUE RELATED TO THE INFRINGEMENT IS A STATUTORY ATTRIBUTION THAT THE INFRINGEMENT CONTRIBUTED TO A PORTION OF THE INFRINGER'S PROFITS.

The Eighth Circuit faithfully follows the plain meaning of the statutory formula in § 504(b) and requires the infringer to disentangle the elements of direct and indirect profits from the "gross revenue" earned in connection with the infringing work.[4] *Andreas v. Volkswagen of America, Inc.*, 336 F.3d 789 (8th Cir. 2003). The Ninth Circuit applies the plain meaning of § 504(b) to direct profits and requires the infringer to disentangle the elements of profit attributable to other factors. *See, e.g., Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 487 (9th Cir. 2000), *cert. denied*, 531 U.S. 1126 (2001). The Ninth Circuit, however, in *Mackie v. Rieser*,

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[4] As the terms are used by the courts, "direct profits" involve direct revenue received from the sale of goods containing the work, the licensing of the right to display the work or for performances of the work, while "indirect profits" involve use of a work for the purpose of enhancing revenue, such as through advertising.

296 F.3d 909, 914-16 (9th Cir. 2002), *cert. denied* 537 U.S. 1189 (2003), expressly rejects the application of the plain meaning of the statutory formula to indirect profits and applies tort law principles, requiring the copyright owner to prove that the infringing use caused an increase in the infringer's revenue. In direct conflict with the Eighth Circuit, the Fourth Circuit in this case followed the holding in *Mackie* concerning indirect profits. The Fourth Circuit, however, in conflict with both the Eighth and Ninth Circuits, expanded the holding in *Mackie* to direct profits in complete defiance of the Congressional language. (Pet. App. 12-25a).

The Ninth Circuit recognized that, "[o]n its face, § 504(b) does not differentiate between 'direct profits'. . . and 'indirect profits'. . . [and does not] discuss whether tort principles, such as causation, should play a role in determining whether the infringer's profits were a result of the infringing act." *Mackie*, 296 F.3d at 914. The Ninth Circuit held, however, "that to survive summary judgment on a demand for indirect profits pursuant to § 504(b), a copyright holder must proffer sufficient non-speculative evidence to support a causal relationship between the infringement and the profits generated indirectly from such an infringement." *Id.* at 915a. "[T]here must first be a demonstration that the infringing acts had an effect on profits before the parties can wrangle about apportionment. To do otherwise would be inconsistent with . . . rudimentary principles of tort law. . . ." *Id.*

The Eighth Circuit, in reversing a judgment notwithstanding the verdict, specifically rejected the holding of *Mackie* that a different rule applied: "Congress did not distinguish between direct and

indirect profits cases in allocating the burden of proof between establishing the fact that an infringement contributed to a defendant's profits and the extent to which the infringement contributed to the profits." *Andreas*, 336 F.3d at 799. The Eighth Circuit also rejected the proposition advanced in *Mackie* that the copyright owner was required to produce evidence that buyers of the promoted product had purchased it because of the infringing commercial in order to meet a burden of a causal connection. *Id.* at 797. Once a nexus was shown by evidence that the copyrighted work was used as an important and intricate part of the infringer's marketing campaign for sale of the Audi automobile, the copyright owner was required under the statute to establish only the infringer's gross revenue from the product advertised, and the infringer then bore the burden of establishing that its profits were attributable to factors other than the infringing work, e.g., the other commercials that did not contain the infringed works, other parts of the infringing commercial, customer loyalty, brand recognition, etc. *Id.*; *see also Data General*, 36 F.3d at 1175 ("The defendant's burden under the apportionment provision of Section 504(b) is primarily to demonstrate the absence of a causal link between the infringement and all or part of the profits claimed by the plaintiff."). The "highly fact-specific" question of allocating an infringer's profits between the infringement and other factors, for which the defendant infringer carries the burden, was a question for the jury. *Andreas*, 336 F.3d at 798.

The Fourth Circuit expanded the holding of *Mackie* to direct profits without distinguishing between direct and indirect profits. (Pet. App. 12-16a). "[W]e

conclude that the . . .[infringers] could properly be awarded summary judgment with respect to any given revenue stream if . . . despite the existence of a conceivable connection, . . .[the copyright owner] offered only speculation as to the existence of a causal link between the infringement and the revenues."[5] (Pet. App. 16a). "Despite § 504(b)'s presumption that the recoverable 'profits. . . attributable to the infringement' are equal to the infringer's gross revenues," (Pet. App. 15a), § 504(b) creates only "an initial presumption that the infringer's 'profits . . . attributable to the infringement' are equal to the infringer's gross revenue." (Pet. App. 10a). *But see Konor Enterprises, Inc. v. Eagle Publ'ns, Inc.*, 878 F.2d 138, 141 (4th Cir. 1989) (strictly applying statutory formula to infringers' revenues, where infringement was a *de minimis* advertising use).

In *Andreas,* the Eighth Circuit pointed out that "[t]he burden of establishing that profits are attributable to the infringed work often gets confused with the burden of apportioning profits between various factors contributing to the profits." *Andreas,* 336 F.3d at 796 (*citing e.g., Mackie,* 296 F.3d at 915, and *Univ. of Colo. Found. v. Am. Cyanamid Co.*, 196 F.3d 1366, 1375 (Fed. Cir. 1999), *cert. denied,* 529 U.S. 1130 (2000)). The Fourth Circuit's analysis exacerbates this confusion by conflating those cases concerning the burden to present proof identifying the infringer's lines of revenue related to the infringement (proof of profits) with those concerning the

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[5] Although the Fourth Circuit decision addressed revenue from "minimum guarantee shortfalls and free merchandise" (Pet. App. 18-19a), Petitioner conceded these lines of revenue and did not brief them in the Court of Appeals.

burden to demonstrate the absence of a causal connection between the infringement and the revenue (apportionment of the profits). (Pet. App. 11-15a). For instance, the Fourth Circuit quotes *Taylor v. Meirick*, 712 F.2d 1112, 1122 (7th Cir. 1983) (Pet. App. 13-14a): "If General Motors were to steal your copyright and put it in a sales brochure, you could not just put a copy of General Motors' corporate income tax return in the record and rest your case for an award of infringer's profits." *See also On Davis v. The Gap, Inc.*, 246 F.3d 152, 160 (2d Cir. 2001)("[T]he statutory term 'infringer's gross revenue' should not be construed so broadly as to include revenue from lines of business that were unrelated to the act of infringement."); *accord Andreas*, 336 F.3d at 797 (restricting revenue to specific product advertised). The Fourth Circuit decision, unlike these cases, did not address the issue of proof of revenue (proof of profits) but rather the issue of a causal connection between the infringement and revenue related to the infringement (apportionment) (Pet. App. 3a & n1., 5a, 7a, 9-10a, 15-18a, 21-23a, 131a); and, the Fourth Circuit's expansion of the opinions of Judge Leval in *On Davis* and Judge Posner in *Taylor* concerning proof of revenue to support summary judgment in lieu of apportionment creates additional confusion in the law.

THE COURT SHOULD ADDRESS THE CONFLICT IN THE CIRCUITS BECAUSE THE DECISION OF THE FOURTH CIRCUIT IS IN CONFLICT IN PRINCIPLE WITH *SHELDON V. METRO-GOLDWYN PICTURES CORP.*, 309 U.S. 390.

While the Court in *Sheldon* held that the infringer was not required to present evidence with mathematical exactness to disentangle and apportion

the factors contributing to the infringer's profits, but only to make a reasonable approximation; *Sheldon*, 309 U.S. at 408; the Court was "scrupulous in insuring that any error in approximation would favor the plaintiff." 4 M. Nimmer & D. Nimmer, *Nimmer on Copyright*, § 14.03[C], at 14-46 (2003). The Eighth Circuit, in *Andreas*, applied an apportionment analysis consistent with *Sheldon* and its progeny by which "the detriment of any speculation" fell on the infringer rather than on the copyright owner. *Andreas*, 336 F.3d at 797; *see also Sheldon*, 309 U.S. at 406. The Fourth Circuit, like the Ninth Circuit in *Mackie*, shifted the burden of any speculation in favor of the infringer. While permitting an infringer to make a "reasonable approximation" in accordance with *Sheldon* (Pet. App. 10a), the Fourth Circuit required the copyright owner to present "specific, nonspeculative evidence" of causation contrary to the principles of apportionment applied in *Sheldon*. (Pet. App. 23a). As a consequence, the Fourth Circuit, in effect, countenanced the apportionment of all the commercial value in the infringing work in favor of the Respondents, as a matter of law, while ignoring the evidence of the commercial value and utility of Petitioner's work to the infringing work. (Pet. App. 149-214a).

THE DECISION EVISCERATES THE PLAIN MEANING OF THE STATUTE AND ITS PURPOSE AND PROMOTES EFFICIENT INFRINGEMENT.

The second sentence of § 504(b) unequivocally states that "in establishing the infringer's profits [attributable to the infringement], a copyright owner is **required to present proof only of the infringer's gross revenue**" (emphasis supplied) and then shifts both the

burden of proof and the burden of persuasion. It represents a Congressional mandate and attribution that proof of revenues represents evidence that the infringement contributed to the infringer's profits. This statutory presumption of profits, particularly given the placement of the word "only", does not disappear in the face of contradictory evidence but instead creates an issue for the fact finder.

The legislative purpose of this provision is that:

> [P]rofits are awarded to prevent the infringer from unfairly benefiting from a wrongful act. . .[and that] the burden of proof is on the defendant in these cases; in establishing profits the plaintiff need prove only "the infringer's gross revenue," and the defendant must prove not only "his or her deductible expenses" but also "the element of profit attributable to factors other than the copyrighted work."

H.R. Rep. 94-1476, *supra,* at 161. "A basic tort theory of damages, awarding only the plaintiff's injury, would allow for cases of 'efficient infringement,' i.e., situations where the profit exceeded the licensing fee, leaving infringers indifferent as to whether they paid up front or paid in court." *Walker v. Forbes, Inc.*, 28 F.3d 409, 412 (4th Cir. 1994); *accord Taylor*, 712 F.2d at 1120.

The Fourth Circuit decision, most particularly as applied to direct revenues, encourages efficient infringement, as it permits those with market and star power to argue, as a matter of law, as in this case, that

it does not matter whose intellectual property they use. The decision permits a Madonna, for example, to argue as a matter of law that, regardless of whose song she might have sung, she would have generated the same revenues. It permits, again hypothetically, a Microsoft with unmatched market share to argue as a matter of law that, regardless of whose accessory software, such as a game of solitaire, it bundled with its Windows operating system, it would have generated the same revenues.

THE DECISION OVERLOOKS AND CONFLICTS IN PRINCIPLE WITH THOSE DECISIONS OF THIS COURT STATING THAT ANY WORK THAT HAS BEEN COPIED AND COMMERCIALLY EXPLOITED IN AN UNAUTHORIZED MANNER HAS COMMERCIAL VALUE AND UTILITY.

The infringing work is virtually an identical copy of Petitioner's work. (Pet. App. 88a & n.A1). Respondents used the Petitioner's work for profit other than as artwork. The decision, in apportioning all commercial value in favor of the Respondents as a matter of law, failed to consider these simple facts as evidence of the commercial value and utility of the infringed work and thereby conflicts with: *Harper & Row*, 471 U.S. at 565 ("[T]he fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression"); *Herbert v. The Shanley Co.*, 242 U.S. 591, 594-95 (1917)("The defendants' performances [of infringed music in a hotel restaurant] are not eleemosynary. They are part of a total for which the

public pays . . . . [T]he purpose of employing it is profit and that is enough."). As Mr. Justice Holmes, speaking for the Court in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903), stated:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. . . . . That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiff's rights.

Accord Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582-83 (1994)(*quoting Bleistein*).

THIS CASE IS THE APPROPRIATE VEHICLE TO DECIDE THE QUESTION.

The decision's holding concerning direct revenues is a clear departure from the statutory formula. This was not a *de minimis* infringement, but one that was part of a process of generating millions of dollars in profits. The decision leaves no gray areas that would benefit from other Circuits addressing the matter, given the conflict with the plain meaning and history of the statute and the conflicts in principle with this Court's decisions.

THE DECISION THAT THE DISTRICT COURT NEED NOT INSTRUCT THE JURY ON APPORTIONMENT UNDER 17 U.S.C. § 504(b) IS IN CONFLICT IN PRINCIPLE WITH A DECISION OF THE FIRST CIRCUIT.

The absence of any substantive instructions on apportionment (Pet. App. 123-27a) enabled Respondents to argue to the jury that Petitioner was greedily seeking "a pot of gold" and an "allocation" and that properly he should be seeking a reasonable wage. (Pet. App. 121-22a). As Judge Widener states in his dissent, the District Court failed to instruct on the controlling law; and the majority view that the District Court need only instruct on the burden of proof is in conflict with *Data General,* 36 F.3d at 1173-77, (*citing Sheldon*), that the District Court must instruct the jury on apportionment under 17 U.S.C. § 504(b) in order to allow the jury to determine whether and to what extent apportionment of profits was reasonable under the circumstances of the case. *See also Monessen Southwestern Ry. Co. v. Morgan,* 486 U.S. 330, 339-42 (1988) (reversing state court decision because instruction improperly took from the jury the essentially factual question under federal law).

CONCLUSION

The Decision distorts a clear Congressional formula and rewrites § 504(b). The Decision allows Respondents, with their tremendous market power, to argue that no matter whose intellectual property they used, they would have generated the same profits. Upsetting the carefully crafted Congressional formula has the effect of providing powerful and savvy market

entities with a license to steal. The jury's decision, made in a legal and factual vacuum, to award Petitioner nothing speaks for itself. When a copyrighted work is used as part of the process of generating millions of dollars in profits and is the centerpiece of marketing, the necessity of making a reasonable apportionment is obvious, and the failure to do so is not only at odds with the Congressional scheme, but is also at odds with common sense and fundamental justice. Therefore, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FREDERICK E. BOUCHAT,
Plaintiff-Appellant,

v. No. 02-1999

BALTIMORE RAVENS FOOTBALL CLUB, INCORPORATED, a/k/a Baltimore Ravens, Incorporated; NATIONAL FOOTBALL LEAGUE PROPERTIES, INCORPORATED,
Defendants-Appellees.

v.

JONATHAN MORGAN,
Movant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Marvin J. Garbis, District Judge.
(CA-97-1470-MJG)

Argued: June 4, 2003
Decided: October 8, 2003

Before WIDENER, WILKINSON, and KING, Circuit Judges.

Affirmed by published opinion. Judge King wrote the majority opinion, in which Judge Wilkinson joined. Judge Widener wrote a dissenting opinion.

COUNSEL

ARGUED: Howard J. Schulman, SCHULMAN & KAUFMAN, L.L.C., Baltimore, Maryland, for Appellant. Robert Lloyd Raskopf, WHITE & CASE, L.L.P., New York, New York, for Appellees. **ON BRIEF:** Marc E. Ackerman, WHITE & CASE, L.L.P., New York, New York; George Beall, HOGAN & HARTSON, L.L.P., Baltimore, Maryland, for Appellees.

OPINION

KING, Circuit Judge:

This appeal arises from the damages phase of a protracted copyright dispute involving the Baltimore Ravens football team. Frederick Bouchat, the holder of the infringed copyright, raises several challenges to the district court's conduct of proceedings that culminated in a jury verdict finding him entitled to no portion of the infringers' profits. In particular, Bouchat asserts that the court erroneously failed to accord him the benefit of a statutory presumption that an infringer's revenues are entirely attributable to the infringement. For the reasons explained below, we affirm.

I.

On November 6, 1995, the National Football League ("NFL") announced that one of its teams, the Cleveland Browns, would shortly be moving to Baltimore. The team was to leave its entire Browns identity in Cleveland, and thus would need a new name and logo when it moved to its new Maryland home. Bouchat, a Baltimore security guard and amateur artist, became interested in the new team, and he began

drawing logo designs based on the various names that the team was considering, including the name "Ravens." On or about December 5, 1995, Bouchat created a drawing of a winged shield (the "Shield Drawing") as a "Ravens" logo.

In March of 1996, the Baltimore team adopted the name "Ravens." In early April, Bouchat sent the Shield Drawing via fax to the Maryland Stadium Authority. Beside the Shield Drawing, Bouchat penned a note asking the Chairman of the Authority to send the sketch to the Ravens' president. Bouchat also requested that if the Ravens used the Shield Drawing, they send him a letter of recognition and an autographed helmet.

In a jury trial on the issue of liability, Bouchat's Shield Drawing was found to have been mistakenly used by National Football League Properties, Inc. ("NFLP") in NFLP's production of the Ravens' new logo, the "Flying B."[1] The Ravens had no knowledge that the NFLP had infringed anyone's work and assumed that the Flying B was an original work owned by NFLP. The Ravens used the Flying B as their primary identifying symbol, and the logo appeared in every aspect of the Ravens' activities, including uniforms, stationery, tickets, banners, on-field insignia, and merchandise.

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[1] NFLP is the Ravens' licensing agent: it grants third parties the right to use the logos and trade/service marks of the various NFL teams in connection with a variety of products and services. In this capacity, NFLP both helped to develop the Ravens' new Flying B logo, and sold to third parties the right to incorporate the Flying B in a wide range of merchandise, including apparel, books, athletic bags, and video tapes.

II.

On May 8, 1997, Bouchat filed suit in the District of Maryland, alleging that the Ravens and NFLP (collectively, the "Defendants") had infringed his copyright on the Shield Drawing and on several other drawings, and seeking ten million dollars in damages. The court bifurcated the case and first tried the liability issues. On November 3, 1998, the jury found that Bouchat had proven infringement of the Shield Drawing. After the court certified the liability verdict for interlocutory appeal, a divided panel of this Court affirmed the finding of liability. *Bouchat v. Baltimore Ravens, Inc.*, 228 F.3d 489 (4th Cir. 2000). We denied rehearing en banc, *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350 (4th Cir. 2001), the Supreme Court denied certiorari, *Baltimore Ravens, Inc. v. Bouchat*, 532 U.S. 1038 (2001), and the matter was returned to the district court for trial of the damages issue.

Bouchat sought damages from the Ravens and NFLP pursuant to 17 U.S.C. § 504(a)(1), which renders an infringer liable for "the copyright owner's actual damages and any additional profits of the infringer, as provided by [17 U.S.C. § 504(b)]."[2] Section 504(b), in turn, entitles the copyright owner to recover both "the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages." 17 U.S.C. § 504(b). Because Bouchat made no claim for actual damages, the

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[2] Bouchat was not entitled to pursue statutory damages because the infringement was of an unpublished work and preceded copyright registration. 17 U.S.C. § 412(1).

sole question presented for resolution in the damages trial was the amount, if any, of the Defendants' profits that was attributable to the infringement.

In his complaint, Bouchat contended that some portion of essentially *all* of the Defendants' revenues was attributable to the infringing use of Bouchat's artwork.[3] To satisfy his initial burden under § 504(b), Bouchat presented evidence of the gross receipts from all NFLP and Ravens activities. The district court, however, awarded partial summary judgment to the Defendants with respect to all revenues derived from sources other than (1) sales of merchandise bearing the Flying B logo, and (2) royalties obtained from licensees who sold such merchandise (collectively, the "Merchandise Revenues"). *Bouchat v. Baltimore Ravens, Inc.*, 215 F. Supp. 2d 611, 619, 621 (D. Md. 2002). The court reasoned that "[i]f the use of the Flying B logo to designate the Ravens could not reasonably be found to have affected the amount of revenue obtained from an activity, the revenue from that activity could not reasonably be found attributable to the infringement." *Id.* at 617-18. Concluding that only the Merchandise Revenues could reasonably be found to have been affected by the Defendants' unlawful use of the Flying B, the court excluded, as a matter of law, the

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[3] Bouchat conceded in the district court that there are a few categories of the Defendants' revenues that could not, in any part, be attributable to the infringement. So, for example, Bouchat did not seek to recover interest earned on Ravens' checking accounts, even though the checks bore the Flying B logo; nor did he seek to recover the revenues obtained from stadium rentals, even though the Flying B logo was prominently featured on the playing field. *See Bouchat v. Baltimore Ravens, Inc.*, 215 F. Supp. 2d 611, 616 (D. Md. 2002).

remainder of the Defendants' revenues (collectively, the "Non-Merchandise Revenues") from the pool of income that the jury could consider in awarding § 504 damages.[4]

At the close of discovery, the district court further narrowed the scope of the Defendants' revenues from which the jury would be permitted to award § 504 damages, when it excluded certain portions of the Merchandise Revenues. *Bouchat v. Baltimore Ravens, Inc.*, Order, No. 97-CV-1470 (D. Md. July 9, 2002) (the "July Order"). Specifically, the court awarded partial summary judgment to the Defendants as to Bouchat's claims for profits from "minimum guarantee shortfalls,"[5] "free merchandise,"[6] trading cards, video games, and game

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4 The Non-Merchandise Revenues would include, for instance, revenues from the sale of game tickets, stadium parking, food, drinks (with the exception of those sold in special logo-bearing cups), broadcast rights, and sponsorships.

5 Under NFLP's retail licensing agreements, licensed vendors of official, logo-bearing merchandise are required to pay a certain sum each year, regardless of whether any sales of licensed products actually occur. Thus, if actual sales fall short of what would be required to generate the guaranteed minimum royalty, a vendor must tender payment in the amount needed to make up the difference. This sum is a "minimum guarantee shortfall" payment. *See* J.A. 1317-26.

6 Under NFLP's retail licensing agreements, a licensed vendor of official, logo-bearing merchandise must provide to NFLP, at no cost, a certain quantity of its licensed products each year. These products are referred to as "free merchandise." *See* J.A. 1317-26.

programs (collectively, the "Excluded Merchandise Revenues"). *Id.* at 1-2.[7]

Though it recognized that the Defendants "ha[ve] the burden of proof," the court nonetheless ruled that, with respect to the minimum guarantee shortfalls and the free merchandise, there could be no rational connection between the particular source of revenue and the act of infringement; and that, with respect to the trading cards, video games, and game program sales, the Defendants had produced unrebutted evidence establishing that the revenues received from those sources were not attributable to the infringement. *Id.* at 2 & nn.1-6. Like the court's earlier summary judgment award, the July Order had the effect of narrowing the scope of the Defendants' revenues that the jury could consider in deciding the amount of § 504 damages, if any, that Bouchat would recover. Both the Non-Merchandise Revenues and a substantial portion of the Merchandise Revenues having thus been excluded, only those revenues derived from the sale of t-shirts, caps, souvenir cups, and other items bearing the Flying B logo (collectively, the

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[7] The July Order also awarded summary judgment to the Defendants with respect to revenues received from "[o]ther" sources, including a "Nike settlement." July Order at 2 & n.3. The record, however, has not enabled us to divine the nature of these "other sources"; and in pressing his appeal, Bouchat has likewise shed no light on the matter. Accordingly, we must deem waived any objection that Bouchat might have had to the award of summary judgment with respect to these revenues. *See generally In re Apex Express Corp.*, 190 F.3d 624, 630 n.5 (4th Cir. 1999) (noting that issue not argued in appellant's brief is deemed waived on appeal).

"Non-Excluded Merchandise Revenues") would go to the jury for a finding on attributability.[8]

The damages trial was conducted over a period of six days, from July 17 to 24, 2002. On July 23, 2002, at the close of the evidence, the jury was asked to decide whether the Defendants had proven, by a preponderance of the evidence, that the Non-Excluded Merchandise Revenues were attributable entirely to factors other than the Defendants' infringement of Bouchat's copyright. If the jury found that they were not, then it was charged to decide the percentage of the Non-Excluded Merchandise Revenues attributable to factors other than the infringement.

After a full day of deliberations, the jury answered the first question in the affirmative, thereby denying Bouchat any monetary recovery. On July 26, 2002, the court entered judgment on the jury verdict. Bouchat filed a timely notice of appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

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[8] By the July Order, the court also granted in part several of the Defendants' motions to exclude evidence. Specifically, the court ruled that Bouchat would not be permitted to raise accounting issues regarding the calculation of the Defendants' gross revenues. Nor would he be allowed to introduce evidence pertaining to Defendants' revenues earned outside of the relevant time frame. The court forbad references to the Defendants' finances unrelated to the use of the Flying B logo, and it limited the issues at trial to a determination of the extent to which the NonExcluded Merchandise Revenues were attributable to the appearance of the infringed artwork. *Id.* at 3-6. Also prior to trial, the court ruled that there was no genuine issue of fact between the parties either as to the amount of the Defendants' gross revenues, or as to the expenses that would need to be deducted to compute total profits. J.A. 525-26.

III.

A.

Bouchat's primary contention on appeal is that the district court erred in awarding partial summary judgment to the Defendants with respect to certain portions of the Defendants' revenues. In particular, Bouchat asserts that the court failed to give him the benefit of the § 504 statutory presumption that an infringer's revenues are entirely attributable to the infringement. That presumption, he maintains, creates a question of material fact that cannot be resolved on summary judgment. Thus, he asserts, whether any portion of an infringer's revenues are attributable to some source other than the infringement is a question that can be resolved *only* by a jury. As explained below, we disagree.

1.

We review de novo a district court's award of summary judgment. *See Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1127-28 (4th Cir. 1987). Under the Federal Rules of Civil Procedure, summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). As the Supreme Court has observed, "this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

2.

Bouchat seeks to recover damages pursuant to 17 U.S.C. § 504(b) for the Defendants' infringement of his copyright. Section 504(b) entitles a successful copyright plaintiff to recover "any profits of the infringer that are attributable to the infringement." 17 U.S.C. § 504(b). The statute goes on to specify that,

> [i]n establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

Id. Thus, § 504(b) creates an initial presumption that the infringer's "profits . . . attributable to the infringement" are equal to the infringer's gross revenue. *See Konor Enters., Inc. v. Eagle Publ'ns, Inc.*, 878 F.2d 138, 140 (4th Cir. 1989). Once the copyright owner has established the amount of the infringer's gross revenues, the burden shifts to the infringer to prove either that part or all of those revenues are "deductible expenses" (i.e., are not profits), or that they are "attributable to factors other than the copyrighted work." *Id.* Although § 504(b) places the burden on the infringer to demonstrate that certain portions of its revenues were due to factors other than the infringement, the infringer need not prove these amounts with mathematical precision. *See Cream Records, Inc. v. Jos. Schlitz Brewing Co.*, 754 F.2d 826, 828-29 (9th Cir. 1985); *cf. Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 408 (1940) (holding that there need only be "reasonable approximation" of recoverable profits).

Despite the existence of § 504(b)'s burden-shifting provision, summary judgment in favor of an infringer with respect to some portion of the infringer's gross revenues may, in the proper circumstances, be appropriate. Though our Court has not spoken directly on this point, several of our sister circuits have awarded partial summary judgment to infringers, excluding as a matter of law certain portions of an infringer's revenues from the jury's § 504(b) attributability inquiry. Furthermore, an award of partial summary judgment to an infringer with respect to particular categories of revenue comports, in the proper circumstances, with the basic tenets of our Rule 56 jurisprudence.

a.

We begin by looking to the decisions of our sister circuits. The § 504(b) cases in which partial summary judgment in favor of an infringer with respect to part, or all, of the infringer's revenues has been found proper, fall roughly into two categories: (1) those in which there existed no conceivable connection between the infringement and a given revenue stream; and (2) those in which, despite the existence of a conceivable link, the plaintiff failed to offer anything more than mere speculation as to the existence of a causal connection between the infringement and the claimed revenues.

The Second Circuit recently affirmed an award of summary judgment to the infringer in a § 504(b) case that presented the first of these scenarios, concluding that there existed no conceivable connection between the infringement and a substantial portion of the revenues claimed by the plaintiff. *See On Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir.

2001). In *On Davis*, the plaintiff (Davis) had submitted evidence that, during and shortly after the Gap undertook an eyewear advertising campaign that infringed his copyright, the Gap's corporate parent realized net sales of $1.668 billion, an increase of $146 million over the revenues earned in the same period of the preceding year. *Id.* at 159. The *On Davis* court acknowledged that "a highly literal interpretation of the statute would favor" the plaintiff, since the statute requires that the copyright owner "present proof only of the infringer's gross revenue." *Id.* at 160 (quoting 17 U.S.C. § 504(b)). The court, however, held that "the term `gross revenue' under [§ 504(b)] means gross revenue reasonably related to the infringement, not unrelated revenues." *Id.* Because the gross revenue of $1.668 billion that Davis submitted was derived in part from sales "that were in no way promoted by the [infringing] advertisement," the court affirmed the summary judgment award in favor of the Gap. *Id.* at 161.

The Ninth Circuit faced the second of the § 504(b) summary judgment scenarios in *Mackie v. Rieser*, 296 F.3d 909 (9th Cir. 2002). In *Mackie*, the plaintiff failed to offer anything more than mere speculation as to the existence of a causal link between the infringement and the claimed revenues, and the court upheld an award of summary judgment in favor of the defendant infringer. *Id.* at 916. The dispute in *Mackie* arose out of the Seattle Symphony Orchestra's inclusion in its advertising brochure of an image of one of Mackie's sculptures. *Id.* at 912. The Symphony admitted that it had infringed Mackie's copyright, and Mackie asserted a claim against the Symphony for both actual damages and profits. *Id.* at 912-13. It was, in the abstract, at least conceivable that the infringement had caused — and would continue, in future seasons, to cause — the Symphony to generate more

revenues than it otherwise would: after all, the Symphony presumably incorporated the image in its brochure with the ultimate goal of increasing its profits; and perhaps, unlikely as it may be, a recipient of the brochure was so enamored of the infringing image that he decided to become a patron of the Symphony. *See id.* at 916. However, as the Symphony noted when it moved for summary judgment, Mackie offered no evidence in support of his theory that the infringement had in fact boosted the Symphony's revenues. *Id.* at 913. When Mackie failed to respond to the summary judgment motion with even a single piece of evidence suggesting the existence of an actual causal connection, the trial court granted the Symphony's summary judgment motion. *Id.*

In affirming, the Ninth Circuit reasoned that, "to survive summary judgment, a copyright infringement plaintiff seeking to recover indirect profits damages [i.e., damages for profits that have an attenuated connection to the infringement] under 17 U.S.C. § 504(b) must proffer some evidence to create a triable issue regarding whether the infringement at least partially caused the profits that the infringer generated as the result of the infringement." *Id.* at 911. "Because Mackie [had] failed to adduce any non-speculative evidence that would even suggest a link between the infringement and the Symphony's supposedly enhanced revenues," summary judgment in favor of the Symphony was appropriate. *Id.*; *see id.* at 916; *see also Univ. of Colo. Found., Inc. v. Am. Cyanamid Co.*, 196 F.3d 1366, 1375 (Fed. Cir. 1999) (holding that plaintiff has "the burden" to demonstrate some nexus between infringement and profits before apportionment can occur); *Taylor v. Meirick*, 712 F.2d 1112, 1122 (7th Cir. 1983) (noting that "[i]f General Motors were to steal your copyright and put it in a sales brochure, you could not

just put a copy of General Motors' corporate income tax return in the record and rest your case for an award of infringer's profits").

b.

The *On Davis* and *Mackie* decisions, upholding awards of summary judgment to § 504(b) defendants, comport fully with our summary judgment jurisprudence. Summary judgment is not solely a defensive mechanism: Rule 56 expressly contemplates the availability of summary judgment to a claimant. *See* Fed. R. Civ. P. 56(a). That a movant bears the ultimate burden of proof or persuasion — as does an infringer in the § 504(b) context — is no obstacle to a summary judgment award in favor of that party, so long as the requirements of Rule 56 are otherwise satisfied. *Cf. Meyer v. Worsley Cos., Inc.*, 881 F. Supp. 1014, 1021 (E.D.N.C. 1994) (awarding summary judgment to defendant who, under relevant statutory scheme, bore ultimate burden of proof, when defendant made requisite Rule 56 showing and plaintiff failed to respond with demonstration of existence of genuine dispute of material fact). Regardless of whether he may ultimately be responsible for proof and persuasion, the party seeking summary judgment bears an initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met that burden, the nonmoving party must come forward and demonstrate that such an issue does, in fact, exist. *See Matsushita Elec. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of [his] pleadings," but rather must "set forth specific facts showing that there is a genuine

issue for trial." Fed. R. Civ. P. 56(e); *see Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87 (holding that, once motion for summary judgment is properly made and supported, opposing party bears burden of showing, by means of affidavits or other verified evidence, that genuine dispute of material fact exists); *Cray Communications, Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 393-94 (4th Cir. 1994); *see also Anderson*, 477 U.S. at 248 (holding that dispute regarding material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). Furthermore, neither "[u]nsupported speculation," *Felty*, 818 F.2d at 1128, nor evidence that is "merely colorable" or "not significantly probative," *Anderson*, 477 U.S. at 249, will suffice to defeat a motion for summary judgment; rather, if the adverse party fails to bring forth facts showing that "reasonable minds could differ" on a material point, *id.* at 250, then, regardless of "[a]ny proof or evidentiary requirements imposed by the substantive law," *id.* at 248, "summary judgment, if appropriate, shall be entered," Fed. R. Civ. P. 56(e).

These general principles only further highlight the propriety of an award of summary judgment under circumstances such as those presented in *On Davis* and *Mackie*. Despite § 504(b)'s presumption that the recoverable "profits . . . attributable to the infringement" are equal to the infringer's gross revenues, the statute does not exempt the copyright plaintiff from the requirement of Rule 56 that he respond to a properly supported motion for summary judgment by "set[ting] forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Should the plaintiff fail so to respond — whether that failure is due to the absence of any conceivable connection between the infringement and the claimed revenues, or instead simply due to the

plaintiff's inability to muster nonspeculative evidence in support of the alleged causal link — then summary judgment may properly be awarded to the infringer with respect to part or all of the contested revenues.

c.

In sum, we conclude that the Defendants could properly be awarded summary judgment with respect to any given revenue stream if either (1) there exists no conceivable connection between the infringement and those revenues; or (2) despite the existence of a conceivable connection, Bouchat offered only speculation as to the existence of a causal link between the infringement and the revenues. It is to these inquiries that we turn next.

4.

The Defendants derive revenues from six major sources: (1) sponsorships; (2) broadcast and other media licenses; (3) sale of tickets; (4) miscellaneous business activities, which appear to include provision of game-day stadium parking; (5) sale of official team merchandise; and (6) royalties from licensees who sell official team merchandise. *See Bouchat*, 215 F. Supp. 2d at 615. The first four of these sources we characterize as the "Non-Merchandise Revenues," while the fifth and sixth are the "Merchandise Revenues." To briefly review the history relevant to this appeal: Early in the case, the court awarded partial summary judgment to the Defendants with respect to the Non-Merchandise Revenues, leaving the Merchandise Revenues for later consideration. *Id.* at 619, 621. Subsequently, the court awarded partial summary judgment to the Defendants with respect to

certain portions of the Merchandise Revenues, to wit, the revenue received from: "minimum guarantee shortfalls"; "free merchandise"; trading cards; video games; and game programs. July Order at 1-2.[9]

Bouchat contends that, because of the Defendants' widespread use of the Flying B as the primary logo — and as an integral marketing tool — for the Baltimore Ravens, some portion of the revenues that the Defendants earned from both the Non-Merchandise Revenues and the Excluded Merchandise Revenues is attributable to the Defendants' infringement of his copyright. When the district court awarded summary judgment to the Defendants as to large segments of their revenues, however, it denied Bouchat the opportunity to prove this contention to the jury. Despite the fact that § 504(b) places on the infringer the burden of proving that revenues are

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[9] It should be noted that, while our precedents appear not to address head-on the propriety of a § 504(b) partial summary judgment like this one, we have made clear that it is appropriate to parse revenue streams as the district court did here. In *Walker v. Forbes, Inc.*, 28 F.3d 409 (4th Cir. 1994), we held that a trial court was within its discretion in permitting an infringer (Forbes) to introduce evidence at trial that tended to show that the use of a particular photograph in a special edition of *Forbes* magazine bore no causal connection to the advertising and subscription revenues that that edition generated. *Id.* at 411-12. The evidence indicated that the vast majority of Forbes's advertising and subscription profits were derived not from the contents of any one edition, but rather from the reputation of the magazine. *Id.* The plaintiff contended that this sort of evidence allowed the jury to impermissibly "sever" whole categories of revenue in determining the proper amount of damages to award. We rejected this contention, though, acknowledging that it is proper to parse an infringer's various revenue streams and assess them categorically, rather than to consider all revenues together. *Id.* Thus, the district court did not err insofar as, at the summary judgment stage, it addressed the Defendants' revenues category-by-category.

not attributable to the infringement, summary judgment was appropriate with respect to both the Non-Merchandise Revenues and the Excluded Merchandise Revenues.

As detailed above, we analyze the excluded revenue streams in two steps. We first consider whether any of the Non-Merchandise Revenues and the Excluded Merchandise Revenues lacked a conceivable connection to the infringement. If so, summary judgment in favor of the Defendants with respect to those revenues was proper. Turning then to the remaining excluded revenues, we inquire whether, despite the existence of a conceivable connection between those revenues and the infringement, Bouchat offered only speculative evidence of such a causal link in response to a properly supported motion for summary judgment. If so, then summary judgment in favor of the Defendants was appropriate with respect to these revenues as well.

a.

Of all the excluded revenues, only the revenues from minimum guarantee shortfalls and free merchandise lack all conceivable connection to the Defendants' infringement of Bouchat's copyright. Because no rational trier of fact could find that these two subcategories of the Excluded Merchandise Revenues were affected by the Defendants' adoption of the infringing Flying B logo, the court properly removed them from the pool of Defendants' revenues submitted to the jury for consideration under § 504(b).

The levels of each licensee's minimum guarantee and free merchandise obligation were established, *ex ante*, by the terms of the licensee's contract with NFLP; neither figure could fluctuate in response to consumer behavior. As a consequence, the amount of revenue that the Defendants received in the form of minimum guarantee shortfalls and free merchandise was necessarily independent of any reaction that any individual might have had to the Flying B logo. Whereas it is at least hypothetically possible (albeit highly unlikely) that an individual became so enamored of the infringing aspects of the Flying B logo that he was thus inspired to purchase tickets for the Ravens' games, to pay for parking, to buy non-logo-bearing concessions, and thus to boost the Defendants' revenues from these sources, a similar scenario cannot be conjured with respect to revenues whose levels were fixed and immutable before licensees had an opportunity to stock their shelves with logo-bearing goods. No rational trier of fact could find that the infringing Flying B logo enabled the defendants to generate more income from these two sources than they would otherwise have done. Because no portion of the Defendants' gross revenues from minimum guarantee shortfalls and free merchandise could be attributable to the infringement of Bouchat's copyright, the court did not err in awarding summary judgment to the Defendants with respect to these two sub-categories of the Excluded Merchandise Revenues.

b.

Having concluded that summary judgment in favor of the Defendants was proper with respect to both the minimum guarantee shortfalls and the free merchandise, we turn now to the Non-Merchandise

Revenues and the remaining sub-categories of the Excluded Merchandise Revenues (i.e., the revenues from trading cards, video games, and game programs). Our inquiry on this point is whether, despite the existence of a conceivable connection between the infringement and the level of revenue that the Defendants earned from these sources, the court was correct in excluding them through summary judgment. Because Bouchat offered only speculative evidence of a causal link between the infringement and the level of the revenues that the Defendants earned from these sources, and because the Defendants' request for summary judgment was supported by unrebutted evidence demonstrating that these revenues were not, in fact, in any way attributable to the infringement, there was no issue of material fact for consideration by the jury. As a result, the court did not err in awarding summary judgment to the Defendants with respect to these remaining categories of revenue.

When they moved for summary judgment, the Defendants successfully carried their initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp.*, 477 U.S. at 323. In support of their initial motion for summary judgment, the Defendants proffered affidavits showing that Non-Merchandise Revenues are driven by business and consumer interest in NFL football, and are in no way responsive to logo design. *See* J.A. 73-104. In support of their subsequent summary judgment motion, the Defendants again proffered numerous affidavits, this time showing that sales of trading cards, video games, and game programs are driven by consumer interest in NFL football, and likewise are in no way responsive to logo design. *See* J.A. 371-88; *see also* July Order at 2 nn.4-6. The supporting

affidavits established beyond reasonable debate that neither any portion of the Defendants' Non-Merchandise Revenues, nor any portion of their revenues from trading cards, video games, or game programs, was attributable to the Defendants' selection and use of the infringing Flying B rather than some other logo.

Having met their initial burden, the Defendants successfully shifted the onus onto Bouchat to come forward and demonstrate that such an issue does, in fact, exist. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87. A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of [his] pleadings," but rather must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87 (holding that, once motion for summary judgment is properly made and supported, opposing party has burden of showing, by means of affidavits or other verified evidence, that there exists genuine dispute of material fact); *see also Mackie*, 296 F.3d at 911 (holding that "to survive summary judgment, a copyright infringement plaintiff seeking to recover [attenuated] profits damages under 17 U.S.C. § 504(b) must proffer some evidence to create a triable issue regarding whether the infringement at least partially caused the profits that the infringer generated as the result of the infringement," and that, should plaintiff "fail[ ] to adduce any non-speculative evidence that would even suggest a link between the infringement and the [defendant's] supposedly enhanced revenues," then summary judgment in favor of defendant with respect to those revenues is proper). Bouchat, however, produced no specific facts showing that there was a genuine issue for trial; in fact, he declined to respond to the summary judgment motions

with any evidence at all, resting instead on his initial, and sole, evidentiary proffer: the total receipts generated by all NFLP and Ravens activities.[10]

Because Bouchat failed to offer any nonspeculative evidence demonstrating the existence of a genuine dispute of material fact, the court appropriately awarded summary judgment to the Defendants on the ground that the Non-Merchandise Revenues and the revenues from trading cards, video games, and game programs could not reasonably be found attributable to the infringement.

In sum, the Defendants established in their motions for summary judgment that there existed no causal link between their adoption of the infringing Flying B logo and either the Defendants' Non-Merchandise Revenues or their revenues from trading cards, video games, or game programs. In response, Bouchat rested on his speculation that somehow, somewhere, some part of the Defendants' revenues from these sources was influenced by the fact that the Defendants selected the Flying B rather than some other logo. However, because "[u]nsupported

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10 That Bouchat failed to respond is, indeed, unsurprising, in light of the fact that the affidavits merely confirm what ordinary experience would otherwise seem to render apparent: that no reasonable trier of fact could find that the sale of a ticket, or of a sponsorship, or of broadcast rights was in any way a consequence of the team's adoption of one logo design rather than another. Similarly, it defies credulity that a consumer would purchase NFL trading cards in order to catch a glimpse of the Flying B logo on a featured player's helmet; or video games, so as to see the logo on the simulated Ravens players; or a game program, simply because its artwork incorporated the Flying B. *See* J.A. 475-80.

speculation is not sufficient to defeat a summary judgment motion," *Felty*, 818 F.2d at 1128, the court properly awarded summary judgment to the Defendants both with respect to the Non-Merchandise Revenues and with respect to the revenues from sales of trading cards, video games, and game programs.

c.

It is the "affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial." *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993) (internal quotation marks omitted); *see Celotex Corp.*, 477 U.S. at 323-24 ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."). Once the Defendants had carried their initial burden of demonstrating the absence of any genuine issue of material fact regarding the attributability of the contested revenues, Bouchat could survive the motion for summary judgment only by adducing specific, nonspeculative evidence supporting the existence of a link between the infringement and the Defendants' supposedly enhanced revenues. Because Bouchat failed to make such a showing, the court properly awarded summary judgment to the Defendants.

B.

Finally, Bouchat contends that the district court, in its instructions to the jury, failed to accord him the full benefit of the statutory presumption contained in §

504(b).[11] Specifically, Bouchat maintains that the court abused its discretion by failing to make clear to the jury that the Ravens bore the burden of proof in the damages trial. To the contrary, the court made it eminently clear in its instructions that the Ravens were obliged to shoulder the burden of proof. *See, e.g.*, J.A. 563-65 (stating to jury, at the outset of trial, that"[i]n this case, the burden of proof is on the *defendants* to prove the extent to which the revenue derived from the sale of these products is attributable to factors other than the art work of the Flying B logo. . . . Question one [of the Verdict form] asks, have *defendants* proven by a preponderance of the evidence that income derived by defendants from the sale of products bearing the Flying B logo was attributable completely to factors other than the art work of the Flying B logo."(emphasis added)); J.A. 903 (instructing jury immediately prior to deliberations that "[t]he case is about whether on the evidence the defendants . . . have carried their burden of proof . . . . On those questions the *defendants* have the burden of proof by a preponderance of the evidence." (emphasis added)).

This burden of proof point was further emphasized by the first question on the Verdict form tendered to the jury by the court, reading "Have the *Defendants* proven by a preponderance of the

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[11] We review a trial court's jury instructions for abuse of discretion. *See Walker v. Forbes, Inc.*, 28 F.3d 409, 414 (4th Cir. 1994). It is well settled that a "district judge has broad discretion in framing his jury instructions." *Merlo v. United Way of America*, 43 F.3d 96, 103 (4th Cir. 1994). Thus, instructions do not furnish grounds for reversal of an adverse verdict so long as, taken as a whole, they "adequately state the controlling law." *Eberhardt v. Integrated Design & Construction Incorporated*, 167 F.3d 861, 869 (4th Cir. 1999).

evidence that income derived by the Defendants from the sale of products bearing the Flying B logo was attributable completely to factors other than the art work of the Flying B logo?" J.A. 564-65 (emphasis added). Viewed in context, the instructions plainly informed the jury of the controlling legal principles; the court therefore did not abuse its discretion.[12]

IV.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

WIDENER, Circuit Judge, dissenting:

I respectfully dissent. I am of opinion that the district court erred by refusing to instruct the jury that the defendants' profits are deemed attributable to the alleged copyright infringement unless the defendants prove otherwise.

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[12] Bouchat also raises several additional challenges to the district court's handling of the damages trial, focusing in particular on other aspects of the instructions and on the court's evidentiary rulings. On careful review, we are unable to discern any abuse of discretion on these issues, and our affirmance of the court on these contentions does not warrant further discussion.

I first recount some of the relevant facts from our earlier opinion in this case. In 1995, Frederick Bouchat was a security guard at an office building. As word spread that a National Football League team was returning to Baltimore, Bouchat drew team designs and logos. He showed the designs to visitors of the building and sometimes gave them away as gifts. *Bouchat v. Baltimore Ravens, Inc.*, 228 F.3d 489, 491-92 (4th Cir. 2000).

After seeing some of Bouchat's designs, a state official who worked in the building arranged a meeting between Bouchat and John Moag, the chairman of the Maryland Stadium Authority. Moag is credited with bringing the Ravens team to Baltimore. After Bouchat described his drawings, Moag told Bouchat to send him the drawings so that he could pass them along to the Ravens for consideration. Bouchat got permission from his supervisor to use the office fax machine and faxed his drawing to the Maryland Stadium Authority. Within a day after Bouchat sent his fax, Moag met with National Football League Properties officials to discuss the design of the new Ravens logo. The Ravens unveiled their new logo several months later. Bouchat and his co-workers immediately recognized the new logo as Bouchat's work. Bouchat successfully sued the defendants for copyright infringement. *Bouchat*, 228 F.3d at 491-92. The district court bifurcated that first trial. After a trial on the issue of liability, the jury found that the defendants infringed Bouchat's copyright and this court affirmed. *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d

350 (4th Cir. 2001). Bouchat then sought damages under 17 U.S.C. § 504(b) in a separate jury trial that is the subject of this appeal.[1]

At the close of evidence in the damages trial, Bouchat asked the district court to give the jury instruction approved by this court in *Walker v. Forbes*, 28 F.3d 409 (4th Cir. 1994). In *Walker*, we affirmed the district court's instruction on the award of profits in a copyright infringement case.[2] Bouchat asked for the instruction by name and also read the relevant language into the record.

The district court declined to give the *Walker* instruction. Instead, the court read from the jury verdict form. Although the district court explained that "the

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[1] As the majority points out, Bouchat could not elect to receive statutory damages because he had not registered his copyright at the time of the infringement.

The majority also notes that Bouchat did not claim any actual damages. This is understandable. Bouchat drew his proposed logos for the Ravens in his spare time and often gave them away as gifts. He submitted his design to Moag only after Moag suggested it. Even then, he asked in return only for "a letter of recognition" and an autographed helmet, "if the team wants to." Thus, it is likely that Bouchat's actual damages, if any, were nominal. Regardless of his actual damages, however, Bouchat is entitled to defendants' profits attributable to the infringement because the award of profits is intended to "prevent the infringer from unfairly benefitting from a wrongful act" and not to compensate the copyright owner. H.R. Rep. No. 94-1476, at 161 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5777.

[2] This court not only affirmed the use of the instruction, but also praised it, noting that "the district court's rich and detailed instructions did an excellent job of explaining to the jury its task in determining the correct apportionment of profit attributable to the infringement, faithfully explaining the rules and procedures set out in the statute." *Walker*, 28 F.3d at 416.

defendants have the burden of proof by a preponderance of the evidence," the court never instructed the jury that they must presume all profits are attributable to the infringement unless the defendants prove otherwise.

I agree with the majority's conclusion that the district court correctly instructed the jury on the burden of proof. Under *Walker*, however, merely stating that the defendant bears the burden of proof is not enough. The *Walker* instruction also informs the jury that profits should be deemed attributable to the alleged infringement unless the defendant proves otherwise. *Walker*, 28 F.3d 414. Indeed, our opinion emphasized the following portion of the district court's instruction: "*amounts or elements of profits should be deemed attributable to the alleged infringement unless [the defendant] proves by a preponderance of the evidence that they are not.*" *Walker*, 28 F.3d at 414 (emphasis in original). The importance of this portion of the instruction is evident from our analysis following the emphasized language:

> This instruction correctly stated the law concerning the shifted burden of proof that the defendant bears to show the portion of revenues and profits that are not attributable to the infringement, and, *in the emphasized language, explained the impact of this shifted burden upon the apportionment calculation.*

Walker, 28 F.3d at 414 (emphasis added). The emphasized language in *Walker* is the basic thought around which the decision is based, and its conscious omission here is, I think, reversible error.

Later cases in this circuit recognize that § 504(b) creates a presumption in favor of the copyright holder on the issue of profits. In *Nelson-Salabes, Inc. v. Morningside Development*, 284 F.3d 505 (4th Cir. 2002), this court acknowledged that "under § 504(b), all gross revenue is presumed to be profit `attributable to the infringement' unless the infringer is able to demonstrate otherwise." *Nelson-Salabes*, 284 F.3d at 512 n.9.

Other courts similarly acknowledge that § 504(b) creates a presumption in favor of the copyright owner. In *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1173 (1st Cir. 1994), the First Circuit held that "the plaintiff must meet only a minimal burden of proof in order to trigger a rebuttable presumption that the defendant's revenues are entirely attributable to the infringement." The rebuttable presumption language in *Data General* has been used by a number of district courts. See *Andreas v. Volkswagen of America, Inc.*, 172 F. Supp.2d 1168, 1170 (N.D. Iowa 2001); *Bruce v. Weekly World News, Inc.*, 150 F. Supp.2d 313, 315 (D. Mass. 2001), *rev'd on other grounds*, 310 F.3d 25 (1st Cir. 2002); *Rainey v. Wayne State University*, 26 F. Supp.2d 963, 971-72 (E.D. Mich. 1998).

In addition to refusing to give the *Walker* instruction, the district court limited its instructions on the award of profits under § 504(b) to an explanation of the special verdict form. The court read each question from the verdict form and then gave a brief explanation of what the question meant. The first question asked "have the defendants proven by a preponderance of the evidence that income derived by the defendants from the sale of products bearing the Flying B logo was

attributable completely to factors other than the artwork of the Flying B logo." The jury answered "yes" to question one and ended their deliberations.

The verdict form and accompanying instructions used in this case are troubling. Special verdict forms "should be resorted to with discrimination and foresight" *Morris v. Pennsylvania R. Co.*, 187 F.2d 837, 841 (2d Cir. 1951). Indeed, Justice Black and Justice Douglas wrote that special verdict forms can be, as here, "used to impair or wholly take away the power of a jury to render a general verdict." Statement of Mr. Justice Black and Mr. Justice Douglas on the Rules of Civil Procedure and the Proposed Amendments, 31 F.R.D. 617, 618 (1963).

In this case, the lack of a clear, or any, instruction relating to the presumption of award of profits, together with the limited scope of the verdict form questions, can only have discouraged the jury from awarding damages to the plaintiff, even if the facts and the law supported such an award. This result runs counter to the fundamental purposes of trial by jury. [3] See 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2503 (2d ed. 1994).

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[3] Some of the greatest legal thinkers in American jurisprudence have written on the importance of leaving juries free to decide cases so that they may apply not only the law, but also their own sense of justice. See e.g., Oliver Wendell Holmes, *Law in Science and Science in Law, in Collected Legal Papers* 237-238 (1920); Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12, 18-19 (1910); John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. Am. Jud. Soc. 166, 170 (1929); Roger J. Traynor, *Fact Skepticism and the Judicial Process*, 106 U. Pa. L. Rev. 635, 640 (1958); Charles E. Wyzanski, Jr., *A Trial Judge's Freedom and Responsibility*, 65 Harv. L. Rev. 1281, 1286 (1952).

In sum, given our holding in *Walker* and the reasoning of later cases, I am of opinion that the jury should have been instructed that defendants' profits are deemed attributable to the infringement unless the defendants prove otherwise by a preponderance of the evidence. Accordingly, I would hold that the district court's instructions to the jury, taken as a whole, did not adequately state the controlling law. In my opinion, the failure of the district court, upon request, to give the instruction on the presumption of damages for the plaintiff, which was literally approved in *Walker*, was an abuse of discretion even if subject to discretionary consideration. It cut the heart out of the plaintiff's case. For that reason, I would reverse and remand for a new trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
CIVIL ACTION NO. MJG-97-1470

FREDERICK E. BOUCHAT *

Plaintiff *

vs. *

BALTIMORE RAVENS, INC., et al. *

Defendants *

[Entered: October 7, 2002]

MEMORANDUM AND ORDER

The Court has before it Plaintiff's Motion for New Trial and the materials submitted relating thereto. The Court finds that a hearing is unnecessary.

I. BACKGROUND

Succinctly stated, Plaintiff filed this lawsuit alleging infringement of his copyright on several drawings. The Court bifurcated the case with a first trial on liability issues to be followed by a second trial, if necessary, on damages issues.

In the first trial phase, the jury found, on November 3, 1998, that Plaintiff had proven infringement of a drawing referred to as the "Flying B Drawing", but not the other drawings at issue. In August of 1999, the Court certified certain questions presented by the first

trial for interlocutory appeal. 28 U.S.C. §1292(b). On October 3, 2000, the Fourth Circuit affirmed the finding of liability. Bouchat v. Baltimore Ravens, Inc., 241 F.3d 350 (4th Cir. 2001).

In the second trial, the damages issues phase, Plaintiff sought damages pursuant to 17 U.S.C. § 504(a)(1) which permits recovery for

> The copyright owner's actual damages and any additional profits of the infringer, as provided by [17 U.S.C. § 504(b).][1]

Plaintiff made no claim for his actual damages. Instead, Plaintiff sought only the "profits of the infringer that are attributable to the infringement." 17 U.S.C. § 504(b). Accordingly, the only question presented for resolution at trial was the amount, if any, of profits of the Defendants that are attributable to the infringement. In this case, the infringement was the use, by Defendants, of a logo derived from the Flying B Drawing ("Flying B Logo"). Plaintiff owned a copyright in the art work inherent in the Flying B Drawing. Plaintiff did not claim that he had any rights to the Defendants' trademarks or the team name. Accordingly, the issue presented was the extent to which, if at all, Defendants' profits were attributable to the infringement of Plaintiffs' rights, that is the exclusive right to use the artwork in which he had a copyright interest.

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[1] It appears that Plaintiff cannot recover statutory damages in the instant case because the infringement preceded copyright registration. 17 U.S.C. § 412(1).

In pretrial proceedings, the Court decided that the pertinent gross receipts which could include any portion attributable to the infringement were those receipts derived from the licensing of merchandise bearing the Flying B Logo and sales of soft drinks in souvenir cups bearing the Flying B Logo.[2] The Court found that there was no issue of fact between the parties as to the amount of these receipts or as to the expenses to deduct to compute the total profits derived from such sales. Accordingly, the fact finder was presented with the following questions:

> 1. Have Defendants proven by a preponderance of the evidence that income derived by Defendants from the sale of products bearing the Flying B Logo was attributable completely to factors other than the artwork of the Flying B Logo?
>
> [If not]
>
> 2. What percentage of the income derived by Defendants from the sale of merchandise bearing the Flying B Logo have Defendants proven, by a preponderance of the evidence, was attributable to factors other than the artwork of the Flying B Logo?

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2 The Court granted Defendants summary judgment as to Plaintiff's claim that a portion of essentially all revenues, i.e., ticket sales, stadium parking, radio and television broadcast rights, etc. was attributable to the use of his artwork.

> 3. What percentage of the income derived by Defendants from the sale of soft drinks in souvenir cups at Baltimore Ravens home football games have Defendants proven, by a preponderance of the evidence, was attributable to factors other than the artwork of the Flying B logo?

There was, and is, a serious question as to whether, in the context of the instant case, the foregoing questions should be answered by a jury or by the Court. See Memorandum and Order of February 1, 2002. In view of the uncertain state of the law, the Court decided to conduct a simultaneous jury and bench trial. Thus, on appeal, the appellate court would have available a jury verdict and a bench decision for consideration. Therefore, on July 26, 2002, following the evidence and arguments of counsel, the Court (prior to receiving the jury verdict) provided the Clerk with his answers to the questions presented to hold under seal for post-verdict announcement. After the jury verdict was received, the Court advised the parties of the bench decision.

The jury answered the first question in the affirmative. Hence the jury found that Defendants had proven by a preponderance of the evidence that income derived by Defendants from the sale of products bearing the Flying B Logo was attributable completely to factors other than the artwork of the Flying B Logo. Based on the jury verdict, Plaintiff was not entitled to any monetary recovery from the Defendants for the profits of the Defendants attributable to the infringement.

As a fact finder, the Court found that Defendants had proven that 99% of the income derived by Defendants from the sale of merchandise bearing the Flying B logo and 99.98% of the income derived by Defendants from the sale of soft drinks in souvenir cups was attributable to factors other than the artwork of the Flying B Logo. This would result in a total recovery of $23,390.68.[3]

The parties agreed that, because the Plaintiff had demanded a jury, the Court must enter judgment based upon the jury verdict.[4] The Court did so on July 26, 2002.

By the instant motion, Plaintiff seeks a new trial.

II. LEGAL STANDARD

Rule 59 of the Federal Rules of Civil Procedure provides in pertinent part:

> A new trial may be granted to all or any of the parties an on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

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[3] Calculated as one per cent of $2,256,272 of total royalties from franchisees on sales of merchandise bearing the Flying B logo and two tenths of one percent of $418,879 of commissions from the sale of soft drinks in souvenir cups.

[4] The Court decided that the issue was for bench decision but, in view of the parties' agreement, entered Judgment based on the jury verdict.

Fed. R. Civ. P., Rule 59. A motion for a new trial involves a "comparison of opposing proofs." Williams v. Nichols, 266 F.2d 389, 393 (4th Cir. 1959). These opposing proofs are based on a judge's interpretation of the evidence. A motion for a new trial under Rule 59 of the Federal Rules of Civil Procedure may be based on a judge's personal weighing of the evidence and his own evaluation of the credibility of the witnesses. See Wyatt v. Interstate Ocean and Transport Co., 623 F.2d 888 (4th Cir. 1980).

Over fifty years ago, the Fourth Circuit Court of Appeals stated that:

> On [a new trial] motion, it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.

Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350, 352 (4th Cir. 1941); see also Defender Indus., Inc. v. Northwestern Mut. Life Ins., Inc., 938 F.2d 502, 507 (4th Cir. 1991).

III. DISCUSSION

In this case, as in every case, the Court has an obligation to provide a fair trial to both sides. In the instant case, that obligation was met. The Court provided the parties with a fair trial, a chance to present

relevant evidence and make appropriate arguments directed to questions that properly set forth the factual issues presented. As discussed herein, Plaintiff's objections to the court's rulings are without merit.

A. Adequacy of the Evidence

This is an unusual case in that the trial judge rendered a bench "verdict" prior to knowing the jury verdict. The Court, without knowing what the jury verdict would be, reached a substantially similar result. The jury found that the Defendants had proven that Plaintiff's artwork contributed nothing at all toward the profits of the Defendants from the sale of merchandise bearing the Flying B Logo. The Court found that the Defendants had proven that all but a de minimis amount of the Defendant's profits from the sale of such merchandise was attributable to factors other than the Plaintiff's artwork. The jury verdict was perfectly reasonable in light of the evidence.

Plaintiff has not demonstrated that the jury verdict was based upon false evidence. Nor was there a miscarriage of justice by virtue of the entry of judgment based upon the jury verdict.

Plaintiff deliberately chose, for tactical reasons, to abandon his perfectly valid claim to compensation for his actual damages.[5] As the Defendants recognized, the Plaintiff was certainly entitled to recover for the fair market value of his services and were willing to pay for

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[5] Of course, as Plaintiff well knew, his actual damages were no more than the $7,000 to $10,000 that a commercial artist would have been paid for an NFL logo drawing.

those services. The Plaintiff instead sought the profits attributable to the infringement. The jury, quite reasonably, found that there were no profits attributable to the infringement. If there is an "unfair" result because the Plaintiff did not recover the fair market value of his services, the "unfairness" is due to the Plaintiff's deliberate refusal to ask for such an award.

In sum, the jury verdict was by no means "contrary to the clear weight of the evidence, . . . based upon evidence which is false, or will result in a miscarriage of justice...." Aetna Casualty & Surety Co. v. Yeatts, 122 F2d at 352.

B. Evidence

Plaintiff's counsel states, avoiding any possible accusation of making an understatement, that the Court's evidentiary rulings "amount to the legitimization of corporate theft or, more politely, one of the most massive uncompensated copyright infringements in history." Plaintiff's Motion for New Trial, ¶3 at 2. The Court disagrees and must conclude that Plaintiff's counsel sought to make an inappropriate appeal to the jury. In Plaintiff's counsel's own words, the following is the case he contends he should have been permitted to present to the jury:

> The historical reputation of the NFL within Baltimore and Maryland was that under cover of darkness on a wintry night in 1984, Robert Irsay surreptitiously loaded the Baltimore Colts into Mayflower moving vans and pirated the franchise to Indianapolis. A significant segment of the

Maryland community considered Irsay's action, condoned by the League, to be the theft of a public treasure in violation of a public trust. When William Donald Schaefer, the Mayor Baltimore in 1984, became Governor in 1986, he introduced legislation authorizing the construction of new baseball and football stadia for the respective sports. With the legislation in place, however, Baltimore was left "waiting at the altar" by the National Football League and was particularly affronted by the League during its expansion in 1993 when Jacksonville, Florida and Charlotte, North Carolina were awarded franchises. The owners of other franchises flirted with Baltimore. Tagliabue's reputed comment that Baltimore should build a museum instead of a stadium was well publicized for years within the Baltimore community and made an indelible impression on the community. Many Baltimoreans perceived Commissioner Tagliabue as the epitome of the League's duplicity, moneyed arrogance and greed, and the League enjoyed little goodwill in Baltimore. At one point, the Maryland Stadium Authority considered filing an anti-trust suit against the National Football League.

As Robert Irsay had been vilified in Baltimore in 1984, Modell was instantly vilified in Cleveland for wanting to move one of the most fabled, faithfully-followed

> and supported franchises to another city for money. Modell became the NFL's "darkest villain." Cleveland's mayor publicly accused Modell of dishonesty.
>
> * * *
>
> . . .[W]hile there were many diehard fans and apologists for the NFL who enthusiastically welcomed the franchise no matter what, a substantial portion of the Maryland community derided the amount of public resources appropriated for the move and the new stadium that would be subsidized by increased ticket prices and other revenues. Others remained Colt fans; and still others were simply ashamed. In summary, the new Baltimore franchise had the task of creating a completely new identity and business goodwill in Baltimore in the face of negative public concerns and perceptions about the new franchise's--or, for that matter, any NFL franchise's--loyalty to the City and the team's fans, given the loss of the Colts to Indianapolis, the relocation or threatened relocation of NFL franchises and Baltimore's perception of the League personified by Tagliabue. THUS was the value added by Plaintiff's creativity and originality to the Ravens' corporate symbol. [Footnotes omitted].

Plaintiff's Motion for New Trial, 18-21.

It is difficult to imagine a presentation that would be more inflammatory to a Baltimore jury and less relevant to the issues presented in the case. As discussed herein, the Court made appropriate rulings in order to prevent Plaintiff's counsel from diverting the jury from the issues actually presented and seeking punishment of the Defendants.

Plaintiff complains that the Court admitted evidence of the amount paid to commercial artists for the production of logos such as the Flying B Logo. Such evidence is relevant to the question of the amount of profits of the infringer attributable to the Plaintiff's artwork. The fact that the NFL normally paid from $7,000 to $10,000 to other designers for the equivalent of the Flying B Logo[6] is evidence that, in the real world of commerce, the pertinent parties did not envision the artwork as having a substantial impact upon the team's income.

Plaintiff argues that the Court erred in excluding evidence that, when the Ravens logos were developed, the Defendants were under extreme time pressure. Perhaps such evidence would have been relevant to a claim by Plaintiff for the fair market value of his services because an argument could have been made that the Defendants would have paid somewhat more when in a time bind. However, there appears to be no logical nexus between Defendants' time bind and the question of whether the artwork in the Flying B Logo affected the amount of sales of merchandise. Moreover, even if there had been some degree of relevance, any probative value

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[6] And something like $100,000 for the entirety of a team's logo system.

was substantially outweighed by the danger of unfair prejudice to the Defendants from the evidence Plaintiff sought to present. See Rule 403, Federal Rules of Evidence.

Plaintiff argues that he should have been permitted to introduce in evidence the Flying B Drawing and Plaintiff's informal note seeking only a letter of recognition and an autographed helmet. These documents have no relevance to the question of whether any part of the profits derived by the Defendants was attributable to the Plaintiff's artwork. Defendants never commercially used the Flying B Drawing but, rather, used the Flying B Logo derived therefrom. No customer ever saw, much less was influenced by, the Flying B Drawing. Moreover, Defendants abandoned any contention that they would be entitled to a "discount" because of their development of the final logo from Plaintiff's drawing. Therefore, the only artwork relevant to the question presented was the final Flying B Logo. Furthermore, if there were any relevance to Plaintiff's proffered exhibits, the Court would have excluded the evidence under Rule 403 of the Federal Rules of Evidence as substantially more prejudicial than probative.

One of the defense witnesses was Michael Dubey, a vice president of Fine Host Corporation, provider of food, drinks etc. during games. Plaintiff properly presented evidence that Fine Host had earned some $9,000,000 from its relationship with the Baltimore Ravens in the last year to establish that there was a close financial relationship between Dubey's company and the Baltimore Ravens leading to a possible implication of bias. Plaintiff was not permitted, however, to present evidence of a $20,000,000 loan transaction between Fine

Host and the Ravens because, in the view of the Court, the evidence was cumulative. The jury was made fully aware that there was a substantial financial relationship between Fine Host and the Ravens. The Court's decision was a reasonable one.

Plaintiff complains that he was not permitted to present evidence that a Ravens executive - not a witness in the instant case - allegedly had presented false testimony in an arbitration proceeding involving the Maryland Stadium Authority and the Baltimore Orioles. The arbitration proceeding had no relationship whatsoever to the instant case. The Court finds no relevance to the alleged fact that a non-witness Ravens Corporate Officer had testified falsely in another case having no connection whatsoever to the instant case. Even if there could be said to be any relevance, the evidence would be excludable under Rule 403 of the Federal Rules of Evidence.

Plaintiff argues that he should have been able to present evidence of spoliation of documents. The allegation of spoliation relates to a discovery dispute that was resolved contrary to Plaintiff's position in the pretrial phase. Moreover, the dispute pertains to accounting issues which were not at issue because, for purposes of the trial, the Defendants adopted Plaintiff's contentions as to the amounts of profit to which Plaintiff's percentage recovery, if any, would be applied. Finally, of course, because the jury found Plaintiff entitled to a zero percent recovery, the actual amount of the profit pool at issue would be immaterial in any event.

C. Arguments

The Court does not find it improper for Defendants, in argument, to have referred to Plaintiff's failure to present affirmative evidence that the artwork contributed something to sales, or to have testified himself. Plaintiff was not prohibited from presenting evidence from an expert, himself, or anyone else, to support the proposition that the Flying B Logo artwork affected profits.

Plaintiff argued at trial that Defendants had not presented evidence of certain market research. In response, Defendants argued that Plaintiff had the use of discovery and could have obtained the evidence if relevant. Defendant's responsive argument was not improper. Plaintiff may dispute the Court's and the Magistrate Judge's discovery rulings, but cannot relitigate those matters in the midst of the jury trial.

Finally, it was not improper for Defendants to argue that Plaintiff could have conducted a survey. Nor do any others of Plaintiff's litany of objections merit discussion.

D. Instructions

Plaintiff objects that the Court did not instruct the jury with regard to various aspects of the law pertaining to copyrights. However, such instructions would not have served to enlighten the jury with regard to the matters actually at issue. Instead, the requested instructions would have confused the jury, opened the door to improper arguments and, quite likely, resulted in unfair prejudice against the Defendants.

Plaintiff's claim that the Court failed adequately to inform the jury of the Defendant's burden of proof is meritless. Not only was the Defendant's burden of proof stated in the instructions, every verdict question was expressed in terms of whether "Defendants [had] proven, by a preponderance of the evidence" the matter in dispute.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for New Trial IS DENIED.

SO ORDERED, this 7th day of October, 2002.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FREDERICK E. BOUCHAT	*
	*
Plaintiff	*
	*
vs.	*
BALTIMORE RAVENS, INC., et al.	*
	*
Defendants	*

* * * * * * *

CIVIL ACTION NO. MJG-97-1470

JUDGMENT
[Entered July 31, 2002]

This action came on for trial before the Court and a jury in two trial phases, Honorable Marvin J. Garbis, United States District Judge presiding. In each phase, after the presentation of evidence, argument and the Court's Charge to the jury a Special Verdict Form was submitted to the jury for their consideration and verdicts were duly rendered.

Accordingly:

I. Judgment shall be, and hereby is, entered in favor of Plaintiff, Frederick E. Bouchat against Defendants Baltimore Ravens, Inc. and National Football league Properties, Inc.:

a. Determining that the Baltimore Ravens "Flying B" Logo infringed Plaintiff's copyright rights in a drawing created on or about December 5, 1995.

b. Determining that Plaintiff is not entitled to any monetary recovery from Defendants.

II. The parties shall bear their own respective costs.

III. Any and all prior rulings disposing of any claims against any parties are incorporated by reference herein.

IV. This Order shall be deemed to be a final judgment within the meaning of Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this 26th day of July, 2002.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FREDERICK E. BOUCHAT	*
Plaintiff	*
vs.	*
BALTIMORE RAVENS, INC.,	*
et al.	*
Defendants	*

CIVIL ACTION NO. MJG-97-1470

ORDER
[Entered July 9, 2002]

For the reasons stated on the record of proceedings held in this matter on June 12 and June 19, 2002, and as supplemented herein:

1. Plaintiff's Objections to the Magistrate Judge's Discovery Ruling Concerning Free Merchandise are OVERRULED. The ruling of the Magistrate Judge is AFFIRMED.

2. The Motion by Baltimore Ravens, NFL Properties, Inc. for Partial Summary Judgment to Exclude Plaintiff's Claim for Prejudgment Interest is DENIED WITHOUT PREJUDICE. The matter shall be considered post-trial.

3. The Motion by Baltimore Ravens, NFL Properties, Inc. for Partial Summary Judgment to Exclude Remote Revenues is GRANTED IN PART AND DENIED IN PART.

a. Defendants are granted summary judgment as to claims for "profits attributable to the infringement" with respect to the following categories of revenue:

(1) Minimum guarantee shortfalls[1],

(2) Free merchandise[2],

(3) Other income [Nike][3],

(4) Trading cards[4],

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1 Amount of revenue received from minimum guarantee was fixed and not affected by, or attributable to, sales of Ravens logo merchandise. Increase or decrease of such sales had no revenue effect. Where minimal royalty amount was reached there was no "shortfall" payment and the amount was included in gross revenue total at issue.

2 Receipt of "free" merchandise is receipt of a royalty payment equal to appropriate value of the merchandise. Nevertheless, the amount of free merchandise received was fixed and not affected by, or attributable to, sales of Ravens logo merchandise. Increase or decrease of such sales had no effect on amount of free merchandise.

3 The amount obtained in the Nike settlement was not affected by, or attributable to, sales of Ravens logo merchandise.

4 While Defendant has the burden of proof, it has produced evidence establishing that no part of the revenue received from trading card sales was attributable to the infringement. Plaintiff has presented no basis upon which a reasonable jury could find that any part of the revenue from trading card sales was attributable to the infringement.

(5) Video games[5], and

(6) Game program sales[6]

b. Defendants are denied summary judgment as to claims for profits attributable to the infringement with respect to the following categories of revenue:

(1) Merchandise bearing multiple (all team) marks.

(a) The gross licensing revenue of this category to be included in the total (all team) gross licensing revenue from Ravens logo merchandise has been appropriately reduced.

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[5] While Defendant has the burden of proof, it has produced evidence establishing that no part of the revenue received from video game sales was attributable to the infringement. Plaintiff has presented no basis upon which a reasonable jury could find that any part of the revenue from video game sales was attributable to the infringement.

[6] While Defendant has the burden of proof, it has produced evidence establishing that no part of the revenue received from game program sales was attributable to the infringement. Plaintiff has presented no basis upon which a reasonable jury could find that any part of the revenue from game program sales was attributable to the infringement.

(b) Defendants shall not refer to, or based any argument upon, the fact that some of the royalty income at issue was obtained with regard to merchandise bearing the logos of more than one team.

(2) Soft drinks in souvenir cups.

(a) These revenues are in a category separate from the category of royalties from the sale of products bearing Ravens logos.

(b) There shall be separate jury findings as to this category of receipts.

4. The Motion by Baltimore Ravens, NFL Properties, Inc. in Limine to Limit Improper and Prejudicial References at Trial is GRANTED IN PART AND DENIED IN PART.

a. There shall be no reference to the matters excluded from the liability trial.

b. There shall be no reference to Arthur Andersen and/or Nancy Temple except, as necessary, reference without name may be made to "Defendants' accountant."

c. There shall be no reference at all to Enron and/or the Orioles Arbitration.

5. The Motion by Baltimore Ravens, NFL Properties, Inc. in Limine to Exclude Testimony and Exhibits of Plaintiff's Accountant, Mark W. Reynolds is GRANTED.

a. There are no accounting issues presented.

b. There shall be no accounting testimony.

6. The Motion by Baltimore Ravens, NFL Properties, Inc. in Limine to Preclude Plaintiff from Referring to Defendants' Revenues Earned Outside the Relevant Time Frame is DENIED AS MOOT.

7. The Motion by Frederick E. Bouchat in Limine Concerning the Testimony of Yoram Wind, Ph.D. is DENIED.

8. The Motion by Baltimore Ravens, NFL Properties, Inc. in Limine to Exclude Certain Exhibits and Testimony is GRANTED IN PART AND DENIED IN PART.

   a. The detailed rulings are reflected in the record of proceedings of June 12 and June 19, 2002.

   b. Counsel may request clarification or further elaboration of the rulings as needed.

9. The Motion by Baltimore Ravens, NFL Properties, Inc. in Limine to Exclude Newspaper and Magazine Articles and the Irrelevant Testimony of Jon Morgan and Michael Olesker is GRANTED IN PART AND DENIED IN PART.

   a. Evidence of the statement by Mr. Modell and Mr. Burke are not excluded.

   b. The other evidence at issue is excluded.

10. The Motion by Baltimore Ravens, NFL Properties, Inc. in Limine to Limit Introduction of Financial Information Unrelated to Use of Flying B Logo is DENIED AS MOOT.

11. The Motion by Frederick E. Bouchat in Limine Concerning Witnesses is DENIED.

    a. Plaintiff's counsel shall be afforded a reasonable opportunity prior to time to interview the witnesses at issue whom the Defendants propose to call at trial (by informal taped interview or by formal deposition).

    b. Defendants shall produce, prior to each interview, any documents pertinent to said witnesses reflecting statements relating to the appearance or attractiveness of the Flying B or other logos.

    c. Plaintiff may request Magistrate Judge Grimm to order (at his discretion) production of further documents relating to the said witnesses.

12. The Objections by Frederick E. Bouchat to the Magistrate Judge's Discovery Ruling Concerning the Identity of Survey Participants and Memorandum are OVERRULED. The ruling of the Magistrate Judge is AFFIRMED.

13. The Motion by Baltimore Ravens, NFL Properties, Inc. to Exclude the Testimony and Exhibits of Plaintiff's Accountant Mark W. Reynolds, Submitted after the Court's 4/5/02 Deadline for Submission of Plaintiff's Expert Reports is GRANTED.

14. The Motion by Frederick E. Bouchat to Strike Affidavits Submitted in Support of Defendants' Motion for Partial Summary Judgment as to Trading Cards, Video Games, Multiple Marks and Other Merchandise is DENIED. See the Corrected Memorandum and Order of October 5, 2001 at 19-21.

SO ORDERED this 8th day of July, 2002.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. MJG-97-1470

FREDERICK E. BOUCHAT,

Plaintiff,

vs.

BALTIMORE RAVENS, INC., et al.

Defendants.

[Entered February 1, 2002]

SUPPLEMENTAL MEMORANDUM AND ORDER

The Court has before it Defendants' Motion for Partial Summary Judgment and the materials submitted relating thereto pertaining to the matters left unresolved in the Corrected Memorandum and Order[3] of October 5, 2001 ("the Basic Decision"). Plaintiff's counsel has advised the Court that he does not request a hearing on the remaining issues. Accordingly, there shall be no further hearing.

In the Basic Decision, the Court set forth its decisional rationale and succinctly stated the pertinent guiding principle as follows:

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[3] The Memorandum and Order of October 5, 2001 was modified in certain nonsubstantive aspects for purposes of clarification and the correction of typographical errors.

> If the use of the Flying B logo to designate the Ravens could not reasonably be found to have affected the amount of revenue obtained from an activity, the revenue from that activity could not reasonably be found attributable to the infringement.

Applying this principle, the Court held that Defendants were entitled to summary judgment with regard to Plaintiff's claim for profits "attributable to the infringement" with respect to broadcast and other media licenses, ticket sales and general business revenues. Therefore, the Court concluded that "except for revenues derived from the licensing of merchandise sales, and possible sponsorships, there appears to be no category of revenues that could possibly be considered as attributable to the infringing use of the Shield Drawing in the creation of the Flying B logo. The Defendants shall be granted summary judgment as to all claims for profits from infringement except as to those profits derived from the licensing of merchandise, any sales of merchandise bearing the Flying B logo and, subject to later ruling, sponsorships." Basic Decision at 19-20.

Plaintiff was provided with the opportunity to engage in adequate discovery with respect to corporate sponsorships. The function of the discovery permitted was to obtain evidence as to the nature of the sponsor relationship and the income derived by the Defendants therefrom. If, and to the extent, that the qualitative evidence as to the nature of the relationship warranted, the Court would have permitted further discovery.

The evidence with regard to the nature of sponsorship and the revenue generated by Defendants is adequate to permit decision on the Defendants' partial summary judgment motion.

A sponsor pays the NFL or NFL Properties or an individual team for the right to designate itself as a "sponsor," to utilize NFL and team logos in its advertising and, in some instances, to sell products on which NFL and/or team logos appear.

With respect to revenue received from sponsors for the use of NFL and team logos in their advertising and to identify the sponsor with the NFL and its teams, Defendants are entitled to summary judgment. As discussed in the Basic Decision there is no reasonable possibility that any of this revenue could have been affected by the aesthetic features of the Flying B logo. The evidence, and common sense, establish beyond reasonable debate, that no part of the amount paid by the sponsors for the use of the Flying B logo (or any other team logo) was attributable to anything other than the team name and the goodwill associated therewith. Accordingly, as to sponsor payments for using team logos, including the Flying B logo, to demonstrate an affiliation with the NFL and Ravens, the Defendants are entitled to summary judgment.

Defendants acknowledge, as Plaintiff has demonstrated, that some sponsors sold merchandise bearing the Flying B logo. For example, Plaintiff has presented evidence of the Flying B logo on a Ford Ranger pickup truck and on boxes of Wheaties offered for sale by the respective manufacturer/sponsor. Under the principle of this Court's Basic Decision, the Defendants

cannot obtain summary judgment as to the revenue derived from these uses of the logo. In these circumstances, the manufacturer/sponsor would be in the same position as a manufacturer/licensee of T-shirts. Hence, to the extent that Ford paid Defendants for the right to use the Flying B logo on the Special Edition Ranger truck, some fraction of the payment could be found attributable to Plaintiff's protected rights in the appearance of the logo.

Defendants' counsel have represented, and the Court is relying upon the representation, that the Plaintiff will be, or has been, provided with information adequate to establish the extent to which sponsors have paid for the use of logos on sold merchandise. Accordingly, while Defendants are entitled to partial summary judgment as to revenues derived from sponsorships-- as described above--they are not entitled to summary judgment as to receipts from sponsors to the extent that such receipts are attributable to the use of logos on merchandise sold by the sponsors. Such revenues are of the same nature, and belong in the same category for purposes of the instant cases as revenues derived from licensing the right to manufacture and/or sell merchandise bearing the Flying B logo.

Finally, the Court notes that Plaintiff presents evidence which, he contends, could lead to the conclusion that the Ravens made false statements in an arbitration with the Baltimore Orioles relating to stadium naming rights.

The Court sees no pertinence whatsoever to the dispute between the Ravens and the Orioles as to stadium naming rights. Nor would any alleged

misstatement by the Ravens in that proceeding have any relevance to the matters now under consideration. Indeed, in the current context, the Court is not making findings based upon the Defendants' credibility. Rather, the Court is deciding, on the applicable summary judgment standard, the extent to which the evidence, viewed as favorably as reasonably possible for the Plaintiff, creates any genuine issues of material fact preventing an award of summary judgment to the Defendants.

For the reasons set forth in the Corrected Memorandum and Order of October 5, 2001 as supplemented herein:

1. Defendants' Motion for Partial Summary Judgment is GRANTED IN PART.

2. Defendants are entitled to summary judgment as to all claims for "profits of the infringer" except claims relating to:

   a. Profits derived from licensing others to sell merchandise bearing the Flying B logo. This category includes profits derived from payments by sponsors for the right to sell merchandise bearing the Flying B logo.

   b. Profits derived from Defendants' sale of merchandise bearing the Flying B logo.

3. By February 11, 2002, Defendants shall advise the Court and Plaintiff if the representation set forth in the last paragraph on page four hereof is incorrect.

SO ORDERED this 31st day of January, 2002.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Frederick E. BOUCHAT,
Plaintiff,
v.
BALTIMORE RAVENS, INC., et al.,
Defendants.

CIVIL ACTION NO. MJG-97-1470
[Entered February 1, 2002]

CORRECTED[1] MEMORANDUM AND ORDER OF OCTOBER 5, 2001

The Court has before it Defendants' Motion for Partial Summary Judgment and the materials submitted relating thereto. The Court has held a hearing and had the benefit of the arguments of counsel.

I. *BACKGROUND*[2]

In 1995, Plaintiff Frederick E. Bouchat ("Bouchat") was employed as a security guard at a State Office building. He enjoyed drawing pictures inspired by comic book characters, in particular Batman. On November 6, 1995, there was a public announcement that the Cleveland Browns would be moving to Baltimore within a short time,

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1 This document clarifies, and corrects typographical errors contained in, the Memorandum and Order issued October 5, 2001. There is no substantive change made herein.

2 For a more complete discussion of the underlying facts, see the Court's Memorandum and Order of February 19, 1999 and the decision on interlocutory appeal, *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350 (4th Cir.2001).

developing local (Baltimore) interest in a new name for the team. Bouchat became interested in the new football team and began drawing designs for the team using various names, including the name "Ravens." On or about December 5, 1995, Bouchat created what shall be referred to as the "Shield Drawing."

In March of 1996, the Baltimore team adopted the name "Ravens." On April 1st or 2nd of 1996, Bouchat sent to the Maryland Stadium Authority a fax of the Shield Drawing[3] with a note written thereon asking the Chairman of the Authority to send the sketch to Mr. Modell (President of the Ravens). Bouchat further wrote in the note "If he would like this design if he does use it I would like a letter of recognition and if the team wants to I would like a adiograph (*sic*) helmet."

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3 Plaintiff claims to have sent two other drawings along with the Shield Drawing.

There is no evidence that anyone connected with the Defendants intentionally caused Plaintiff's drawing to be considered by the designers engaged by NFL Properties to design the Ravens' logo. Nevertheless, presumably due to a misunderstanding as to its origination, Plaintiff's drawing was used by the graphic artists engaged by NFL Properties in their production of the "Flying B logo."

The Defendants, with no knowledge that the designers had infringed anyone's work and assuming that they were dealing with an original work owned by NFL Properties, used the Flying B logo as the primary Ravens' identifying symbol. The Flying B logo was used in every aspect of the Ravens' activities including, but not limited to, player's uniforms, stationery, tickets, banners, on-field insignia and on merchandise offered for sale. The Flying B logo was included in the portfolio of NFL team logos licensed for use by merchandisers.

Plaintiff filed this lawsuit alleging infringement of his copyright on the Shield Drawing as well as several other drawings. The Court bifurcated the case and first tried liability issues. On November 3, 1998, the jury found that Plaintiff had proven infringement of the

Shield Drawing, but not the other drawings. In August of 1999, the Court certified the case for interlocutory appeal. On October 3, 2000, the Fourth Circuit affirmed the finding of liability. *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350 (4th Cir.2001). The case is now before the Court for trial of damages issues. By the instant motion, Defendants seek summary judgment with regard to certain of Plaintiff's damages claims.

II. *DISCUSSION*

A. *Partial Summary Judgment is Appropriate*

Under the federal copyright statute, an infringer is liable for either:

> (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or
> (2) statutory damages, as provided by subsection (c).

17 U.S.C. § 504(a).

A prevailing copyright plaintiff may elect, at any time prior to the entry of final judgment, to recover statutory damages in lieu of actual damages and profits. 17 U.S.C. § 504(c)(1). In this case, with one infringed work, statutory damages would be no more than $30,000[4] and could be as little as $200.00 or $750.00. 17 U.S.C. § 504(c)(1),(2).

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[4] There is no claim of willful infringement which, if proven, would increase maximum statutory damages to $100,000.

Bouchat, apparently making no claim for actual damages, seeks to recover the "profits of the infringer[s]" pursuant to 17 U.S.C. § 504(b). That statute provides, in pertinent part:

> (b) Actual Damages and Profits.--The copyright owner is entitled to recover ... any profits of the infringer that are attributable to the infringement .... In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

To meet his initial damage burden of proof, Bouchat has presented evidence of the gross receipts from all activities of Defendants National Football League Properties, Inc. and Baltimore Ravens, Inc. Under the statutory scheme, the burden shifts to the Defendants to prove "deductible expenses and the elements of profit attributable to factors other than the copyrighted work." *Id.* The Defendants assert that certain categories of their gross receipts include no revenues "attributable to the infringement" and seek summary judgment as to Plaintiff's claim with respect to those categories of receipts. Defendants' position is consistent with appellate decisions recognizing that the statutory language "infringer's gross revenues" must be interpreted to mean gross revenues which are related to the infringement so as possibly to include receipts "attributable to the infringement."

As stated in *Taylor v. Meirick,* in which the defendant copied and sold 3 of plaintiff's copyrighted maps as well as other merchandise:

> all [the burden shifting language of § 504(b)] means is that [the plaintiff] could have made out a prima facie case for an award of infringer's profits by showing [the defendant's] gross revenues from the sale of the infringing maps. It was not enough to show [the defendant's] gross revenues from the sale of everything he sold....

712 F.2d 1112, 1122 (7th Cir. 1983).

Moreover, even to the extent that a Plaintiff can shift the burden of proof by showing gross receipts from activities *related to* the infringement, a Defendant may still be entitled to summary judgment. In such a case, the Defendant, under generally applicable summary judgment principles, can be granted summary judgment to the extent that there is no genuine issue of material fact with respect to particular expenses or elements of profit attributable to factors other than the copyrighted work.

Defendants recognize that receipts relating to the Defendants' sale of merchandise bearing the Flying B logo and royalties obtained from licensees who sold such merchandise could include some revenues attributable to the infringement. Accordingly, the Defendants acknowledge that there are genuine issues of material fact as to "the deductible expenses and the elements of profit attributable to factors other than the copyrighted work" with regard to millions, and perhaps tens or hundreds of millions, of dollars of their gross receipt. Defendants

contend, however, that their other sources of revenue could not reasonably be found to have been attributable to any degree at all by the use of the Flying B logo. The Defendants place their other sources of revenue in the following categories:

1. Sponsorships.
2. Broadcast and other media licenses.
3. Ticket sales.
4. General business revenues.

Bouchat, as can best be determined from the papers and arguments of counsel, contends that virtually every category of Defendants' gross receipts would include revenues attributable to the infringement because of the Defendants' widespread use of the "Flying B" as the primary logo for the Baltimore Ravens. Counsel's rationale seems to be that the *use* of the logo in regard to an activity means that the revenues derived from that activity would be, in part, attributable to the infringement. Hence, he argues that revenues obtained from such sources as ticket sales, parking at games, and food sales at games are, in part, attributable to the use of the Flying B logo.

Plaintiff's counsel concedes that there are some categories of revenues that could not, in any part, be attributable to the infringement. Thus, he acknowledges that the use of the Flying B logo by other teams (on their game tickets, for example), the interest earned on Ravens' checking accounts, and the revenues obtained from stadium rental would not, in any part, be attributable to the infringement even though the Flying B was presented on Ravens' checks and prominently featured on the playing field. Tr. pg.23 ln.8,–pg.24 ln.11, pg.27 ln.12–pg.28, ln.8.

Accordingly, even Plaintiff's counsel acknowledges, as he must, that there are some categories of Defendants' gross receipts which generate no profits attributable to the infringement. The question thus presented is not whether the Defendants are entitled to partial summary judgment as to a portion of their gross receipts. Rather, the issue is the extent to which partial summary judgment is appropriate.

B. *The Extent of Partial Summary Judgment*

In the context of copyright infringement litigation, the instant case presents an unusual and, to an extent unique, situation. In most, if not all, of the reported cases, the copyrighted work has an intrinsic value which the infringer uses to generate profits. For example, the script of a play which is used in a motion picture[5], the use of a copyrighted representation of a product in an advertisement indicating that the product (or equivalent) would be available from the infringer[6], the use of part of a copyrighted work in advertisements indicating that the infringer was selling a new edition of the copyrighted work[7], the inclusion of a copyrighted photograph in a magazine published by an infringer[8], etc.

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5 *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940).

6 *On Davis v. The Gap, Inc.*, 246 F.3d 152 (2nd Cir. 2001).

7 *Konor Enters., Inc. v. Eagle Pub'ns, Inc.*, 878 F.2d 138 (4th Cir. 1989).

8 *Walker v. Forbes, Inc.*, 28 F.3d 409 (4th Cir.1994).

In such a case, it is appropriate to view the infringer as taking or using value inherent in the infringed work itself. In the instant case, the copyrighted work--a picture of a shield with wings and a stylized letter "B"-- had no material value[9] unless and until the Defendants used the picture as the Ravens logo. At that point, and solely due to the efforts of the Defendants and the use of the name "Ravens" (owned by the Defendants), the good will of the Baltimore Ravens football team became associated with the Flying B logo, thus giving it commercial value.

In the instant case, the use of the Flying B logo by the Baltimore Ravens on its printed material, uniforms, banners, etc. gave commercial value to the logo so that it could be used in conjunction with the name of the Baltimore Ravens and the team's goodwill to generate profits. Any profits attributable to the infringement, *i.e.* attributable to the Defendants' use of the Shield Drawing to create the Flying B logo, would necessarily have to result from revenue generated *because of* the use of the Flying B logo. Revenues that were derived without regard to whether the Flying B logo was used could not be considered "attributable to" the logo. After all, in making an award for profits attributable to the infringement, one is not charging the infringer for the mere *use* of the copyrighted work but, rather, is ascertaining what profits *were attributable to* the infringement.

The Defendants acknowledge that there are genuine issues of material fact as to "the profits attributable to the infringement" in regard to revenues obtained by virtue of the sale of merchandise bearing the

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[9] Other than such aesthetic value one might find in the Shield Drawing *sans* the name "Ravens."

Flying B logo. Thus, as an illustration, consider the revenue derived from licensing a hypothetical T-shirt manufacturer who paid a total of $1,000,000 of royalties for the use of NFL logos on its merchandise in the relevant period. The following factual questions, and perhaps others, would have to be resolved:

1. What portion of the $1,000,000 in total royalties was paid for merchandise bearing a Ravens' logo?
2. Of such Ravens' logo bearing merchandise, what portion bore the Flying B logo?
3. Of the royalty paid with regard to merchandise bearing the Flying B logo, what portion of the royalties paid is attributable to factors other than Bouchat's copyright work?[10]
4. What expenses are deducted to obtain the profit derived?

In sum, while the net result may be a small fraction of the pertinent gross receipts, a reasonable jury could find there to be some profit attributable to the infringement in regard to the sale (by Defendants or licensees) of merchandise bearing the Flying B logo. The rationale is that the amount of revenue could have been affected by the use of the Flying B logo. Indeed, a

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[10] For example, other features such as the use of the names "Ravens," "National Football League" as well as logos and trademarks owned by Defendants, etc. *See Rogers v. Koons*, 960 F.2d 301 (2nd Cir.1992).

customer selected the particular tee-shirt bearing the Flying B logo and could have been influenced in part by the use of Bouchat's copyrighted drawing.

In sharp contrast, there appears to be no other categories or types of income earned by the Defendants (with the possible exception of sponsorship revenues not now being considered) that could reasonably be considered attributable to the infringement. There has been no sensible argument presented, much less evidence, that could support a conclusion that any other source of revenue could have been affected by the use of the Flying B logo. It is inconceivable that any one would buy game tickets, purchase food or drink[11], use stadium parking, pay to broadcast a televised game, etc., because of the use of the Flying B logo as distinct from merely using the name of the team.

The guiding principle in distinguishing between potentially attributable, and definitely not attributable, types of income can be succinctly stated in the context of the instant case as follows:

> If the use of the Flying B logo to designate the Ravens could not reasonably be found to have affected the amount of revenue obtained from an activity, the revenue from that activity could not reasonably be found attributable to the infringement.

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[11] Of course, revenues from the sale of specialty cups or other items bearing the Flying B logo could, possibly, have been affected by the infringement.

In *Walker v. Forbes,* 28 F.3d 409 (4th Cir. 1994), the Defendant magazine publisher included, in a 408 page issue, a photograph which infringed the Plaintiff's copyright. The Fourth Circuit affirmed the district court's admitting evidence to establish that advertisers committed their revenues prior to seeing the magazine as published and, therefore, could not have been affected in their decision to advertise by the use of the infringing photograph. In *Walker v. Forbes,* the question presented was the admissibility of evidence and not entitlement to summary judgment. Nevertheless, the appellate court recognized an essential principle. That is, unless there is some reasonable possibility that revenue could be affected by an infringement, the revenues (and profits inherent therein) could not be attributable to an infringement. Accordingly, the Fourth Circuit recognized a distinction between subscription sales that could not have been affected by the use of the infringing photograph and newsstand sales. As to the latter, it was at least possible that some customers would peruse the contents of the magazine before purchase and could have been affected by the inclusion of the infringing photograph.

In *Konor Enters., Inc. v. Eagle Pub'ns, Inc.,* 878 F.2d 138 (4th Cir. 1989), the Plaintiff published a telephone directory. The Defendant started to publish a competing directory representing to advertisers that it was publishing the "third" or "next" edition of Plaintiff's directory. The Defendant used copies of Plaintiff's copyrighted advertisements as samples for prospective advertisers. The appellate court reversed the district court's award of only nominal damages and remanded the case for trial. The appellate court recognized, as justified by the evidence, that Defendant's revenues could have been affected by the infringement. Hence, it was necessary to

have a factual determination as to the extent to which revenues, and their profits, were attributable to the infringement. Nevertheless, *Konor* does not prohibit summary judgment in a situation in which there was an infringing use even though no reasonable fact finder could find that any revenues (or profits) were attributable to the infringement.

In *On Davis v. The Gap, Inc.*, 246 F.3d 152 (2nd Cir. 2001), the Plaintiff owned a copyright in certain "nonfunctional jewelry worn over the eyes in the manner of eyeglasses." *Id.* at 156. The Defendant published an advertisement for the Gap, one of its chains of retail stores, showing a photograph including an individual wearing Plaintiff's copyrighted eyewear. The district court granted summary judgment on Plaintiff's claim for infringer profits due to the failure of Plaintiff to establish a causal connection between the infringement and the Defendant's profits. The Second Circuit reversed, but, in so doing, recognized the principles that guide this Court in its decision. As stated therein:

> Because the ad infringed only with respect to Gap label stores and eyewear, we agree with the district court that it was incumbent on Davis to submit evidence at least limited to the gross revenues of the Gap label stores, and perhaps also limited to eyewear or accessories. Had he done so, the burden would then have shifted to the defendant under the terms of § 504(b) to prove its deductible expenses and elements of profits from those revenues attributable to factors other than the copyrighted work.

> It is true that a highly literal interpretation of the statute would favor Davis. It says that "the copyright owner is required to present proof only of the infringer's gross revenue," 17 U.S.C. § 504(b), leaving it to the infringer to prove what portions of its revenue are not attributable to the infringement. Nonetheless we think the term "gross revenue" under the statute means gross revenue reasonably related to the infringement, not unrelated revenues.
>
> *Id.* at 160.

In *On Davis,* as in cases cited therein, the Court held that:

> the statutory term "infringer's gross revenue" should not be construed so broadly as to include revenue from lines of business that were unrelated to the act of infringement.
>
> *Id.*

In the *On Davis* decision, the court held that the advertisement at issue could have affected revenues only with respect to Gap label stores and eyewear. Hence, even though the infringing advertisement was used by Gap, Inc., there could not have been profits attributable to the infringement beyond those of Gap label stores or, perhaps, only sales receipts for eyewear or accessories. By no means was the Second Circuit holding that use of an infringing photo in an advertisement necessarily means that some portion of any category of the users'

profits can be attributable to the infringement. Rather, a trial court must determine if it is reasonably possible that certain types of revenues could have been affected by the infringement. If so, as to those types of revenues the burden shifts to the infringer to show what portion of the profits is due to elements other than the infringement.

There can, as illustrated by *On Davis*, be a category of revenues excluded from infringement analysis broadly defined as revenues from all operations other than a specific one, *e.g.*, Gap label stores but not other Gap operations. There can also, as illustrated by *On Davis*, be categories of revenue excluded from infringement profit analysis less broadly defined, *e.g.*, all revenues other than those from eyewear sales. The bottom line is that the trial court must view the facts in the case before it and decide the extent to which the defendant's revenues can be said to be related to the infringement and the extent to which any reasonable fact finder could conclude that particular categories of revenue could include any receipts attributable to the infringement. To the extent the Court determines that categories of revenue cannot reasonably be found to be attributable to an infringement, a defendant can be granted summary judgment as to those categories.

In the case at Bar, the Court holds that except for revenues derived from the licensing of merchandise sales, and possibly sponsorships, there appears to be no category of revenues that could possibly be considered as attributable to the infringing use of the Shield Drawing in the creation of the Flying B logo. The Defendants shall be granted summary judgment as to all claims for profits from infringement except as to those profits derived from the licensing of merchandise, any sales of merchandise

bearing the Flying B logo and, subject to later ruling, sponsorships.

III. *THE AFFIDAVITS*

Plaintiff seeks to strike the affidavits submitted by the Defendants in support of their motion. Essentially, Plaintiff contends that the affidavits do not present admissible evidence based upon their personal knowledge. Plaintiff further contends that the affidavits were not disclosed in discovery proceedings.

The Court finds Plaintiff's sweeping objection to the use of the affidavits inappropriate. In the context of the instant case, Defendants did not have an obligation to disclose the identities of these affiants in response to discovery requests prior to the filing of the instant motion for summary judgment.

As to the substance of the testimony, the Court will consider the affidavits as evidence only to the extent that the statements therein would be admissible at trial. The Court is not, at this time, deciding upon summary judgment as to sponsorships. Accordingly, the affidavits are not being relied upon at all with regard to that subject.

As to matters other than sponsorships, the affidavits are not particularly significant in the context of the instant motion. The Court is by no means relying upon any opinion of an affiant that no portion of certain categories of revenue or profits is attributable to the infringement of Plaintiff's work. Statements such as "[t]o my knowledge, no company entered into a business relationship with the Ravens Club because of the

presence of the winged shield logo on the Raven's Club stationery," [David Modell Aff. ¶ 9]; "In my experience in broadcast television, I have never known the creative aspects of a team logo to factor into a broadcast company's decisions regarding the negotiations of a broadcast rights agreement with a league," [Sean McManus Aff. ¶ 4] are taken to be true statements of the knowledge of the affiants but not relied upon by the Court as a basis for its decision. It is not necessary to rely upon David Modell's affidavit to find it beyond conception that a decision to obtain a personal seat license, a season ticket, a game ticket, a stadium parking space or a hot dog at half time could conceivably be affected by whether the tickets, the players' uniform, the flags in the parking lot or the hot dog stand displayed the Flying B logo.

The Court's decision herein is based upon the inability of the Plaintiff to demonstrate a genuine issue of material fact (or even present a logical argument) that could cause a reasonable person to find that certain of the Defendants' categories of revenue (and thus profits) could be attributable to the infringement of Plaintiff's copyrighted work.

IV. *CONCLUSION*

For the foregoing reasons:

1. Defendants' Motion for Partial Summary Judgment is GRANTED IN PART.

2. Defendants are entitled to summary judgment as to all claims for "profits of the infringer" except claims relating to:

   a. Profits derived from licensing others to sell merchandise bearing the Flying B logo.

   b. Profits derived from Defendants' sale of merchandise bearing the Flying B logo.

3. This Memorandum and Order does not resolve Plaintiff's claims for profits from "sponsorships."

SO ORDERED this 31st day of January, 2002.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FREDERICK E. BOUCHAT,
Plaintiff-Appellee,

v.

No. 99-1617

BALTIMORE RAVENS, INCORPORATED;
NATIONAL FOOTBALL LEAGUE
PROPERTIES, INCORPORATED,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Marvin J. Garbis, District Judge.
(CA-97-1470-MJG)

Argued: March 3, 2000
Decided: October 3, 2000
[as amended January 17, 2002]

Before WIDENER and KING, Circuit Judges, and
James H. MICHAEL, Jr., Senior United States District
Judge for the Western District of Virginia,
sitting by designation.

Affirmed by published opinion. Senior Judge Michael wrote the opinion, in which Judge Widener joined. Judge King wrote a dissenting opinion.

COUNSEL

ARGUED: Robert Lloyd Raskopf, WHITE & CASE, L.L.P., New York, New York, for Appellants. Howard J. Schulman, SCHULMAN & KAUFMAN, L.L.C., Baltimore, Maryland, for Appellee. ON BRIEF: John Paul Reiner, Marc E. Ackerman, WHITE & CASE, L.L.P., New York, New York; George Beall, HOGAN & HARTSON, L.L.P., Baltimore, Maryland, for Appellants. Robert J. Kasunic, Germantown, Maryland, for Appellee.

OPINION MICHAEL,

Senior District Judge: Frederick E. Bouchat (the "plaintiff-appellee") filed this action, seeking $10,000,000 in damages, in the United States District Court for the District of Maryland, alleging that the Baltimore Ravens, Inc. and National Football League Properties, Inc. (the "defendants-appellants") had infringed his copyright rights in three different drawings consisting entirely of his original work, including a shield drawing created by Bouchat in late 1995 when developing his "shield logo" for the new National Football League team– the Baltimore Ravens. Bouchat holds a copyright on his shield drawing and claims that the defendants' designers copied protected elements of that drawing. The defendants claim that they developed the Baltimore Ravens' official shield logo independently. The case was tried before a jury over nearly five weeks in October and November 1998. The jury returned a verdict in favor of Bouchat. The defendants filed a motion for judgment as a matter of law notwithstanding the verdict or, in the alternative, for a new trial as to the third drawing, contending -among other things – that the plaintiff failed to prove that the defendants had access to Bouchat's drawing. The district court, by order, denied defendants' motion in

February of 1999. In April 1999, however, the District Court certified several questions to this court which form the basis of this interlocutory appeal. Based upon the reasoning below, this court affirms the decision of the district court.

I.

Frederick Bouchat is an amateur artist. He has a ninth grade education, and now works as a front entrance security guard at the State of Maryland Office building on St. Paul Street in Baltimore. Bouchat often showed his artwork to people passing through the building's main entrance.

As news of an NFL team for Baltimore spread in 1995, Bouchat created drawings and designs for the team based on his favorite possible team name -- the Ravens. Bouchat created a helmet design and affixed his creation to a miniature football helmet. Bouchat gave the design and helmet to Eugene Conti, a state official who worked in the St. Paul Street office building. Conti kept the helmet displayed in his office. Bouchat showed other team drawings to employees of the building, and gave two drawings away as holiday gifts in December of 1995.

Conti asked a colleague to arrange a meeting between Bouchat (an enthusiastic Baltimore fan) and John Moag, chairman of the Maryland Stadium Authority (the man who brought the team to Baltimore) in order to include a story about Bouchat in the employee news letter. On March 28, 1996, Bouchat was taken to meet Moag at Moag's law office on Pratt Street. The Ravens, and David Modell (the team's owner) occupied the same office suite in the Pratt Street building as a temporary space at this time.

At the meeting, photos were taken and Moag told Bouchat that the team was going to be named the Ravens. When Bouchat described his drawings, Moag told Bouchat to send his drawings along, and Moag would give them to the Ravens for consideration. The next day, Bouchat got permission from his supervisor to use the office fax machine in order to send his drawings to Moag at the Maryland Stadium Authority (MSA). Jan Drabeck, Bouchat's immediate supervisor, showed Bouchat how to use the fax machine. On April 1 or 2, 1996, Bouchat faxed his drawings to the MSA. He received a fax confirmation but did not retain the printed confirmation receipt. One of the drawings Bouchat faxed to the MSA was his shield drawing.

On April 2, 1996, Modell met with the NFL Properties Design Director to discuss the development of a Ravens logo. Thereafter, Modell communicated with the design team concerning the logo project. The Ravens unveiled their new logo in June of 1996. The new Ravens logo was a Raven holding a shield.

Bouchat and several of his co-workers immediately recognized the new logo as Bouchat's work. Bouchat contacted a lawyer, and in August of 1996 he obtained copyright registration for his shield drawing. In May of 1997 Bouchat filed this lawsuit against the Ravens and NFL Properties for infringing his copyright on the design at issue. In November of 1998, the jury returned a verdict in favor of the plaintiff, but only as to his shield drawing.[1] Defendants filed a motion for judgment as a matter of law which the district court denied. The district court then certified the following questions for interlocutory appeal: (1)

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[1] Bouchat claimed copyright infringement as to three drawings, but only won a favorable verdict as to the shield drawing. Only the verdict as to the shield drawing is challenged on appeal.

Was the plaintiff's proof of a reasonable possibility of access legally insufficient? (2) If so, will the Fourth Circuit adopt the "strikingly similar" doctrine inferring access, as expressed in Gaste v. Kaiserman, 863 F.2d 1061, 1968 (2d Cir. 1988)? (3) Should the copyright infringement claim be dismissed because the plaintiff failed to note the derivative nature of the shield drawing on the application for copyright, where defendants have not proven fraud or a purposeful failure to advise the copyright office of facts that might have caused rejection of the application? (4) Did the court improperly coerce the jury to reach its verdict? These four questions are the basis for the defendants' interlocutory appeal.

II.

To prove copyright infringement, a plaintiff must show first that he owned the copyright to the work that was allegedly copied, and second, that the defendant copied protected elements of the work. See Towler v. Sayles, 76 F.3d 579, 581 (4th Cir. 1996) (citing Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 361 (1991)). Where direct evidence of copying is lacking, plaintiff may prove copying by circumstantial evidence in the form of proof that the alleged infringer had access to the work and that the supposed copy is substantially similar to the author's original work. See Towler, 76 F.3d at 581-82.

Defendants contend that Bouchat did not establish access. To prove access, Bouchat was required to show that the NFL designers, the alleged infringers, had an opportunity to view Bouchat's drawing. See id. at 582. The jury was entitled to infer that the NFL designers had access if a third party intermediary (Modell) with a close

relationship to the alleged infringers (the NFL designers) had access. See id. at 583. This court, however, has rejected mere "speculative reasoning" as a basis for proving access, especially when intermediaries are involved. Id. Reasoning that amounts to nothing more than a "tortuous chain of hypothetical transmittals" is insufficient to infer access. Id. at 583 (quoting Meta-Film Assoc., Inc. v. MCA, Inc., 586 F. Supp. 1346, 1355 (C.D. Cal. 1984)).

Defendants, in denying actual receipt of Bouchat's faxed drawings, claim that Bouchat's proof amounts only to a "tortuous chain of hypothetical transmittals" and therefore is legally insufficient to prove access. Defendants' argument is not persuasive. In Towler, the plaintiff relied on the theoretical possibility that agents to whom she had sent her screenplay "could have sent the work to" the alleged infringer. Id. There was no evidence that the agents had sent the work to the defendant, only the plaintiff's suggestion that such a transmittal was hypothetically possible. This, the Fourth Circuit concluded, was not adequate proof of access. See id.

Bouchat offered evidence that his shield drawing was transmitted first to Moag, who shared an office with Modell (who had a close relationship with the alleged infringers on the design project). Bouchat testified that Moag offered to forward his (Bouchat's) drawings to the Ravens and that Bouchat sent the fax of the drawings to MSA, addressed to Moag. The jury was entitled to credit that testimony. Evidence was also introduced that the regular practice at the MSA was to forward faxes for Moag to his Pratt Street office. The jury was thus entitled to conclude that the faxed drawing reached Moag at the Pratt Street office. Defendants admit that Modell and other Ravens staff shared office space with Moag in the Pratt

Street building, and that Modell's own office was within "earshot" of Moag's office. By proving that the drawings were transmitted to Moag, and that Modell shared the same office space with Moag, Bouchat proved that Modell had "access" to Bouchat's drawing. The chain of transmittals is far more than hypothetical– it is based on the testimony of Bouchat and the evidence regarding standard office routines at the MSA. See Fed. R. Evid. 406.

The defendants successfully argue that Bouchat did not prove that Modell actually saw Bouchat's drawings. However, Bouchat was not required to prove that Modell in fact saw the drawings and copied them. Rather, Bouchat was merely required to prove that Modell had access to the drawings by showing Modell had the opportunity to view them. See Towler, 76 F.3d at 582. Bouchat clearly presented sufficient evidence to sustain that burden. Having concluded that Modell had access to the drawings, the jury was able to combine that conclusion with the substantial similarity between the Raven's logo and Bouchat's drawing to find, ultimately, that the Ravens copied Bouchat's copyrighted work.

The district court, in its memorandum opinion, speculates that the fax addressed to Moag might have been mis-delivered to Modell himself, since Modell's name appeared in the message written on the fax and since the fax featured a large raven, concerning which Modell would obviously be the interested party. Bouchat's evidence is sufficient to demonstrate access even if we do not posit any fortuitous mis-delivery of the fax. A copyright infringement plaintiff need not prove that the infringer actually saw the work in question; it is enough to prove that the infringer (or his intermediary) had the mere opportunity to see the work and that the

subsequent material produced is substantially similar to the work. See id. Adequate evidence of the infringer's or the intermediary's opportunity to see the work exists and therefore Bouchat's proof of access is legally sufficient to sustain the jury's verdict in his favor.[A1]

A1 Plaintiff's Drawing The Accused Work

Plaintiff's Drawing The Accused Work A copy of the plaintiff's shield logo and the accused work of the NFL Properties is shown above. There is no dispute as to the similarity of the works, not only because the similarity is facially indisputable, but the defendants' expert witness testified, and the plaintiff's expert agreed, that the designs are so similar that they could not have been created independently from one another. The dissent notes that "it is just as likely that Bouchat copied the Ravens logo as vice versa." Infra, note 10. The jury decided this issue of fact after considering such evidence as: the testimony from 19 identification witnesses for the plaintiff that they had seen the plaintiff's shield drawing in late 1995 (two of whom had received copies of the shield drawing as Christmas presents in December, 1995); the March 28, 1996 offer from Mr. Moag to forward Bouchat's drawings to Mr. Modell; the forwarding by Mr. Modell to NFL Properties of unsolicited sketches on at least two occasions in the relevant time period; Bouchat's April 1 or 2, 1996 fax of his shield drawing to Moag; the defendants' inability to present convincing evidence of any preliminary sketches or drawings before April 2, 1996 by NFL Properties of the Ravens shield logo; the June 6, 1996 unveiling of the Ravens shield logo; and the instant recognition by Bouchat and others of the Ravens logo as a copy of Bouchat's work. The dissent states that there is evidence counter to the above, but such a conflict in evidence presents the classic jury issue, and the jury's resolution of that issue was for the plaintiff.

III.

The second question certified on interlocutory appeal is conditional, requesting a response if the answer to the first certified question was that the plaintiff's evidence of access was insufficient. This court remains firm in its holding that the plaintiff's evidence of access is legally sufficient to sustain the jury's verdict. However, this court also finds it proper to briefly address the question of whether this circuit will adopt the "strikingly similar" doctrine inferring access, as expressed in Gaste v. Kaiserman, 863 F.2d 1061, 1968 (2d Cir. 1988).

The strikingly similar doctrine, as expressed in Gaste, permits an inference of access in cases where the two works in question are so similar as to create a high probability of copying and negate the reasonable possibility of independent creation. See id. at 1067-68. The Seventh Circuit has also adopted this doctrine in agreement with Gaste, holding that "a similarity that is so close as to be highly unlikely to have been an accident of independent creation is evidence of access." Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1170 (7th Cir. 1997). The Fifth Circuit, on the other hand, has held that where there is striking similarity that precludes the possibility of independent creation, "`copying' may be proved without a showing of access." Ferguson v. National Broadcasting Co., Inc., 584 F.2d 111, 113 (5th Cir. 1978) (citations omitted). Unlike the Fifth Circuit, this court does not favor the wholesale abandonment of the access requirement in the face of a striking similarity. Rather, like the Second and Seventh Circuits, this court recognizes that striking similarity is one way to demonstrate access. Access remains an indispensable part of a copyright infringement claim.

As made clear by the Second Circuit in Gaste, "Though striking similarity alone can raise an inference of copying, that inference must be reasonable in light of all the evidence." 863 F.2d at 1068; see also Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984) ("no matter how great the similarity between the two works, it is not their similarity per se which establishes access"). Furthermore, the Second Circuit went on to explain that "[a] plaintiff has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of independent creation." Id. (citations omitted). It is clear that a showing of striking similarity does not per se relieve the plaintiff of his burden of establishing access. However, striking similarity is circumstantial evidence of copying, thereby supporting an inference of access. What is important is that the access prong remains intact, but the level of similarity between the contested works can be used as evidence of access. Any finding of access must be reasonable in light of all of the facts of a particular case. This interpretation is consistent with that of the Second and Seventh Circuits. There is no binding precedent in the Fourth Circuit that addresses the substance of the Gaste opinion.[2] As discussed in Section II of this opinion, the plaintiff in this matter made a reasonable showing of access, independent from the striking similarity of the works. However, the striking similarity of the works was a proper factor for the jury to consider, in conjunction with all other evidence, to determine whether the plaintiff had proven copying by circumstantial evidence.

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[2] Prior to the instant opinion, this court has only cited Gaste in one published opinion. In Towler v. Sayles, this court mentions Gaste but expressly declined to answer the question as to the requisite proof of access in the face of striking similarity. See 76 F.3d 579, 584-85 (4th Cir. 1996).

IV.

Defendants contend that Bouchat's drawing does not qualify for copyright protection, because it does not contain sufficiently original elements. However, the copyright infringement claim should not be dismissed based on alleged defects in plaintiff's copyright application. Defendants' argument on this point must be rejected.

Bouchat's drawing contains several public domain elements which are not protectable. These elements, however, were selected, coordinated, and arranged in such a way as to render the work original. See Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 345-46, 358 (1991); M. Kramer Manufacturing Co., Inc. v. Andrews, 783 F.2d 421, 438-39 (4th Cir. 1986). The drawing, therefore, is entitled to copyright protection.

The district court recognized that Bouchat failed to note the derivative nature of his authorship in his copyright application, but the court also found that there is no evidence of any fraudulent or knowing misstatement with regard to the application. (JA at 1310.) This court held, in Service & Training, Inc. v. Date General Corp., 963 F.2d 680, 689 (4th Cir. 1992), that an inadvertent omission will not invalidate a copyright registration.

Defendants argued below that the alleged flaw in Bouchat's copyright application served to divest the district court of subject matter jurisdiction over the infringement claim. (JA at 1310.) On appeal, they now argue that the flaw in the application serves to divest Bouchat of all copyright protection and thus is fatal to his infringement claim as a threshold matter. However, the premise on which this argument is built -- that Bouchat's

drawing is not protectable -- is simply wrong. Neither the fact that Bouchat incorporated public domain elements in his drawing (the letter "B", a cross, a shield) nor the fact that he did not expressly indicate on his application that such elements rendered his authorship of the drawing derivative in nature, invalidate the protection to which his drawing is otherwise entitled under his valid copyright registration. See Service & Training, 963 F.2d at 689. Accidental but harmless mistakes in a copyright application do not subsequently preclude an infringement action against an alleged copier.

V.

Although the jury had difficulty in reaching a verdict, and the district court judge gave supplemental instructions twice, including an Allen charge, the court did not improperly coerce the jury to reach its verdict. Supplemental instruction may not be coercive, and a reviewing court must consider the totality of the circumstances in deciding whether the trial court abused its discretion. Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp., 41 F.3d 182, 191 (4th Cir. 1994).

The district court delivered the Allen charge on Friday, October 30, 1998 at 2:10 PM. The jury continued to deliberate until 5 PM that day, and again on Tuesday, November 3. On Tuesday, the jury sent a note to the judge, in response to which the court delivered further supplemental instructions. When the court inquired as to the scheduling preferences of the jurors later that afternoon, they responded at 4:30 PM, indicating that they were making progress. At 5:10 PM the jury reached its verdict.

The district court specifically told the jurors that it was not suggesting anyone surrender their honest convictions about the case. (JA 1200-1201.) The district court characterized its instructions as "fair and balanced," (JA 1327), and such a characterization is accurate. The fact that the jurors were actively encouraged to persist in their effort to reach consensus does not mean that they were coerced.

VI.

Based on the foregoing, this court affirms the district court's denial of the defendants' motion for judgment as a matter of law, and responds to the question posed in the interlocutory appeal.

AFFIRMED

KING, Circuit Judge, dissenting:

Because the jury's verdict in favor of Bouchat is entirely without legal or factual support, the district court erred in denying the defendants' renewed motion for judgment as a matter of law. The defendants are entitled to judgment, and therefore I must respectfully dissent.

I.

We review de novo the district court's denial of the defendants' Rule 50(b) motion for judgment as a matter of law, viewing the evidence in the light most favorable to Bouchat, and giving him the benefit of all reasonable inferences. See Austin v. Paramount Parks, Inc., 195 F.3d 715, 727 (4th Cir. 1999). If there is evidence upon which a reasonable jury could have found in Bouchat's favor, we are obliged to affirm the jury's verdict. Duke v. Uniroyal, Inc., 928 F.2d 1413, 1417 (4th Cir. 1991).

Although appellate courts are "compelled to accord the utmost respect to jury verdicts and tread gingerly in reviewing them, we are not a rubber stamp convened merely to endorse the conclusions of the jury, but rather have a duty to reverse the jury verdicts if the evidence cannot support it[.]" Price v. City of Charlotte, 93 F.3d 1241, 1250 (4th Cir. 1996) (internal citations omitted). Judgment as a matter of law is appropriate when "there is no legally sufficient evidentiary basis" to support the jury's verdict. Fed. R. Civ. P. 50(a)(1).

II.

To prove copyright infringement, a plaintiff must present evidence establishing two elements by a preponderance of the evidence: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). I agree with the majority that Bouchat has satisfied the first element of a copyright infringement action. Ante at 8-9. That is, Bouchat does possess a valid certificate of copyright registration for his shield drawing from the United States Copyright Office -- dated almost two months after the Ravens publicly unveiled their shield logo.[1] See J.A. 27.

With regard to the second element, however, I simply cannot agree with the majority's conclusion that this evidentiary record establishes that the defendants copied Bouchat's shield drawing. Proof of copying may be accomplished by either direct evidence or circumstantial evidence. Keeler Brass Co. v. Continental Brass Co., 862 F.2d

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1 Bouchat's copyright registration is dated July 25, 1996. The Ravens publicly unveiled their new uniforms and insignia, including the shield logo, on June 6, 1996.

1063, 1064 (4th Cir. 1988). In cases where direct evidence is lacking, a plaintiff may prove copying by presenting circumstantial evidence that: (i) the alleged infringer had access to the plaintiff's work; and (ii) the infringer's work is "substantially similar" to the plaintiff's original. Towler v. Sayles, 76 F.3d 579, 581-82 (4th Cir. 1996).

In this case, Bouchat presented no direct evidence that the defendants copied his drawing in creating the Ravens shield logo. Thus, Bouchat bore the burden of demonstrating through circumstantial evidence that the defendants had access to his work, and that the Ravens shield logo is "substantially similar" to his original work. As the district court recognized, substantial similarities in the two works are readily apparent. Therefore, the outcome of this proceeding hinges on a single inquiry: whether Bouchat demonstrated that the defendants had "access" to his shield drawing.

III.

To prove access, Bouchat was required to show that the defendants -- specifically the NFLP designers charged with creating the logo for Baltimore's new professional football franchise-- had a reasonable opportunity to view, and thereby copy, his shield drawing. See ante at 5 (citation omitted). A "mere possibility" is not enough; rather it "must be reasonably possible that the paths of the infringer and the infringed work crossed." Towler, 76 F.3d at 582 (emphasis added) (citing Moore v. Columbia Pictures Indus., Inc., 972 F.2d 939, 942 (8th Cir. 1992)). Indeed, as the majority recognizes, speculative reasoning that "amounts to nothing more than a `tortuous chain of hypothetical transmittals' is insufficient to infer access." Ante at 5

(citing Towler, 76 F.3d at 583) (quoting Meta-Film Assocs. v. MCA, Inc., 586 F. Supp. 1346, 1355 (C.D. Cal. 1984)).

Notwithstanding the majority's casting aside of the substance of Towler, that decision's characterization of "speculative reasoning" is quite apposite here, because Bouchat's evidence of access constitutes nothing more than a "tortuous chain of hypothetical transmittals." To conclude that Bouchat demonstrated "access," the jury necessarily found that Bouchat's shield drawing traveled the following circuitous route:

- the Maryland Stadium Authority ("MSA") actually received Bouchat's facsimile transmission (Step 1);
- MSA then forwarded Bouchat's fax to the Pratt Street office of John Moag's law firm (Step 2);
- David Modell of the Baltimore Ravens (which rented office space in the Pratt Street building housing Moag's law firm -- but on a different floor than Moag), received Bouchat's drawing (Step 3); -
- Modell, or someone else within the Ravens organization, forwarded Bouchat's drawing to designers Rhonda Kim and Kurt Osaki of the NFLP in New York (Step 4).

Based on the evidence presented at trial, including Bouchat's testimony that he faxed the drawing to MSA and evidence that MSA regularly forwarded certain correspondence to Moag's law office, the majority finds that Bouchat has met his initial burden in showing that Steps 1 and 2 may have been reached, and that "[t]he jury was thus entitled to conclude that the faxed drawing reached Moag at the Pratt Street office." Ante at 5.

A.

Given our limited standard of review, I am constrained to agree with the majority that the jury was entitled to credit Bouchat's testimony that he faxed his shield drawing to MSA's office. However, the evidence supporting such a finding, consisting solely of Bouchat's own testimony, is marginal at best.[2] Bouchat presented no witnesses who saw him send the fax; he submitted no confirmation sheet verifying that the facsimile transmission was successful; and he failed to produce any telephone records confirming the transmission. Moreover, the Deputy Director of MSA testified that, following the initiation of this lawsuit, he conducted an investigation to determine whether MSA had received Bouchat's fax. Based on this investigation, he concluded that "[e]very member of[MSA] staff said they had no knowledge of this drawing." J.A. 322.

Nevertheless, I agree with the majority that a reasonable jury could have concluded that Step 1 was adequately proved, and that Bouchat faxed the shield drawing to MSA. However, this is merely the beginning, rather than the end, of our inquiry; Bouchat was required to prove much more.

B.

With regard to Step 2, I cannot agree that the jury, on this evidence, could find the fax reached Moag at the Pratt Street office of his law firm, Patton Boggs. In support of its conclusion otherwise, the majority relies

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[2] Even the jury was not fully convinced by Bouchat, as evidenced by their simultaneous and inconsistent verdict that he failed to prove that he had faxed two other drawings along with the shield drawing. J.A. 1237, 1239-40.

solely on evidence "that the regular practice at MSA was to forward faxes for Moag to his Pratt Street office." Ante at 5. From this evidence, the jury apparently inferred that Moag had received Bouchat's shield drawing prior to creation of the Ravens shield logo.

However, "an inference must be a logical and reasonable deduction from the facts proved. It may be unreasonable if it is at war with uncontradicted or unimpeached facts." Selle v. Gibb, 567 F. Supp. 1173, 1182 (N.D. Ill. 1983), aff'd, 741 F.2d 896 (7th Cir. 1984) (internal quotations and citation omitted).[3] Thus, if a plaintiff's claim

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[3] An "inference" is a common evidentiary device which allows the trier of fact to draw "a logical deduction or conclusion from established fact." United States v. Grow, 394 F.2d 182, 199 (4th Cir. 1968). That is, an inference permits the jury to find an ultimate fact to have been proven based upon proof of another fact. The determination of whether an inference is reasonable "cannot be decided in a vacuum; it must be considered in light of the competing inferences to the contrary." Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 818 (4th Cir. 1995) (internal citations omitted).

In Pennsylvania R.R. Co. v. Chamberlain, 288 U.S. 333 (1931), the Supreme Court concluded that it is "not permissible [to infer the existence of a particular fact] in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the facts sought to be inferred did not exist." Id. at 341. Similarly, in Ford Motor Co. v. McDavid, 259 F.2d 261 (4th Cir. 1958), we explored the jury's ability to draw inferences from established facts, writing:

> [I]t is the province of the jury to resolve conflicting inferences from circumstantial evidence. Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.

Id. at 266.

is based upon inferences, they must be logical and reasonable, and not directly contradicted by otherwise undisputed facts. Only then are the inferences permissible.

In this case, the evidence does not permit the inference that Moag received Bouchat's shield drawing. First, beyond the preliminary inference that the fax was received by MSA, Bouchat offered no direct evidence that MSA thereafter forwarded the shield drawing to Moag. Nevertheless, the majority approves of the additional inference -- based exclusively on MSA's general policy of forwarding correspondence to Moag -- that MSA sent the shield drawing to Moag's law office. I disagree on this point; the majority's inference-upon-inference determination that Moag received Bouchat's shield drawing is much too speculative to support a finding of access. See Selle, 741 F.2d at 902.

Indeed, the only evidence produced at trial on this issue is inconsistent with the jury's inference that the faxed drawing reached Moag. The office manager at Patton Boggs testified that an investigation of internal office files did not indicate receipt of any drawings from Bouchat. Likewise, when Moag was asked whether he recalled receiving any artistic submissions from Bouchat after their initial meeting, he replied, "No, I do not. I remember meeting Mr. Bouchat but I don't remember receiving anything from him." J.A. 966.

Although it is within the province of the jury to evaluate the credibility of these witnesses, the jury cannot:

> arbitrarily discredit a witness and disregard his testimony in the absence of any equivocation, confusion, or aberration in it. It is not proper to submit uncontradicted testimony to a jury for the sole purpose of giving the jury the opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness.

M.H. Thomas & Co. v. Hawthorne, 245 S.W. 966, 972 (Tex. Civ. App. 1922) (quoted with approval in Chesapeake & O. Ry. Co. v. Martin, 283 U.S. 209, 219-20 (1931)). See also Browning v. Crouse, 356 F.2d 178, 180 (10th Cir. 1966); Eaton v. National Broad. Co., 972 F. Supp. 1019, 1024 (Ed. Va. 1997), aff'd, No. 97-2162, 1998 WL 258381 (4th Cir. May 21, 1998) (per curiam). As the Seventh Circuit recognized in Selle, "the testimony of credible witnesses concerning a matter within their knowledge cannot be rejected without some impeachment, contradiction or inconsistency with other evidence on the particular point at issue." 741 F.2d at 903 (citations omitted).

In the face of the uncontradicted evidence that Bouchat's shield drawing was not received at Moag's law office, MSA's general practice of forwarding correspondence to Moag, standing alone, is simply insufficient to support a jury finding that the drawing actually reached Moag's office. In short, the majority's second inference (Step 2) -that MSA forwarded the drawing to Moag's office-- amounts to nothing more than "mere speculation, conjecture, or a bare possibility of access." See Selle, 741 F.2d at 902.

C.

Furthermore, assuming the jury could permissibly find that the shield drawing reached Moag's office (Step 2), Bouchat's proof of access is even less convincing in the succeeding two steps. After the drawing reached Moag's law office, Step 3 in the access analysis is premised on another inference -- that the fax was then sent to Modell of the Ravens organization. In this regard; the majority infers access based on another thin reed -- the mere fact that the Ravens rented temporary office space from Moag's law firm: "By proving that the drawings were transmitted to Moag, and that Modell shared the same office space with Moag, Bouchat proved that Modell had `access' to Bouchat's drawing." Ante at 5.

Once again, however, Bouchat produced no evidence to corroborate his contention that Modell received the shield drawing. Instead, Bouchat asks us to infer -- based on his testimony that he sent a fax of the drawing to MSA -- that MSA received it; infer further - based on MSA's policy of forwarding correspondence addressed to Moag to Moag's law office -- that the drawing was sent to Patton Boggs; and then infer even further -- based on the fact that the Ravens rented office space from Patton Boggs -- that Modell received the drawing. While the majority regards an office policy as sufficient proof that MSA forwarded the fax to Moag, it ignores Moag's personal policy and practice to the contrary of not forwarding to the Ravens material sent to MSA. This error directly conflicts with both common sense and numerous authorities to the contrary. Corporate receipt of the material alleged to be infringed is simply insufficient proof of access in the face of uncontroverted evidence that corporate policy was to

separate these sorts of submissions from the alleged infringers. See Grubb v. National Football League Properties, 901 F. Supp. 36, 39 (D. Mass. 1995); Vantage Point, Inc. v. Parker Bros., Inc., 529 F. Supp. 1204 (E.D.N.Y. 1981).

Furthermore, the evidence at trial is consistent with Moag's policy of not forwarding material to the Ravens. The undisputed evidence was that neither Modell nor any other Ravens official ever received Bouchat's shield drawing. As the district court conceded, "There is no direct evidence specifically proving that the Shield Drawing fax was provided to Mr. Modell, and he generally denies any knowledge of such a fax." J.A. 1313.

There is more. All witnesses from the Ravens organization categorically denied having received or viewed Bouchat's shield drawing prior to creation of the Ravens shield logo. Modell himself testified unequivocally that he never received any Bouchat drawings. Likewise, David Cope, the Ravens vice-president for marketing (and the official responsible for handling outside submissions during the months of March and April 1996), testified that he did not see any drawings submitted by Bouchat. Although juries are generally entitled to disbelieve the testimony of any witness, "the testimony of credible witnesses concerning a matter within their knowledge cannot be rejected without some impeachment, contradiction or inconsistency with other evidence on the particular point at issue." Selle, 741 F.2d at 903 (citations omitted). Again, the inference that Modell received the shield drawing cannot fairly be characterized as anything other than "mere speculation, conjecture, or a bare possibility of access."

D.

Nonetheless, even if we also assume that Modell received Bouchat's shield drawing (Step 3), such a conclusion still leaves the drawing nearly 200 miles south of the NFLP's New York office. To establish access, Bouchat bore the additional burden of proving Step 4 -- that Kim and Osaki, the NFLP's creators of the allegedly infringing work, had a reasonable opportunity to view or to copy his shield drawing. See Towler, 76 F.3d at 582; see also Eaton, 972 F. Supp. at 1024 n.7 (E.D. Va. 1997) ("Proof of access is only probative of copying to the extent that the alleged copier had access to the protected work. Thus, it is access by the creators of the allegedly infringing work that must be shown.").

1.

Significantly, the majority does not discuss whether Kim and Osaki had a reasonable opportunity to view or copy Bouchat's shield drawing. The majority's analysis on this point is a single sentence, concluding simply, "The jury was entitled to infer that the NFL designers had access if a third party intermediary (Modell) with a close relationship to the alleged infringers (the NFL designers) had access." Ante at 5. Under this so-called "third party intermediary doctrine," courts may "infer that the alleged infringer had a reasonable possibility of access if the author sent the copyrighted work to a third party intermediary who has a close relationship with the infringer." Towler, 76 F.3d at 583.

The problem with this point is simple – the inference is rebutted by uncontradicted testimony. Inferring access under this doctrine, like any inference, must be a reasonable deduction from established fact. See Grow, 394 F.2d at 199. The defendants introduced undisputed

evidence inconsistent with the majority's inference that Modell shared the drawings with someone at the NFLP. For instance, Mr. Cope testified that the Ravens did not forward any materials or drawings to the NFLP after March 18, 1996, approximately two weeks prior to Bouchat's claimed date of access.[4] Similarly, the undisputed evidence indicates that Bouchat's shield drawing was not received by the NFLP in New York. Bruce Burke, the NFLP's vice president and creative director, when asked whether he saw any of Bouchat's drawings prior to the final selection of the Ravens logos, testified simply, "No, absolutely not." J.A. 864. Similarly, Paula Guibault, the NFLP's senior intellectual property counsel, when asked whether she had seen any of Bouchat's drawings prior to the initiation of this lawsuit, replied, "No, I did not." J.A. 1053. And finally, both Kim and Osaki, the NFLP artists responsible for the design of the Ravens shield logo, testified unequivocally that they had never seen any drawings submitted by Bouchat.[5]

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[4] In finding the evidence sufficient to support the jury's finding of access, the district court relied largely on evidence "that at least on two occasions in the pertinent time period, unsolicited sketches were sent by Mr. David Modell to NFLP." J.A. 1314. However, both of these submissions were forwarded to the NFLP prior to the Ravens's institution of a no-forwarding policy on March 18, 1996. By contrast, as Cope's undisputed testimony indicated, the policy was in effect when Bouchat allegedly faxed his shield drawing on April 1, 1996. Therefore, the district court's suggestion that unsolicited sketches were forwarded to the NFLP during "the pertinent time period" is inaccurate.

[5] Kim and Osaki were initially contradicted by Bouchat's "expert," who testified that it was a "fact[ ]" that Asians -- Kim and Osaki are presumably of Asian descent -- are "taught in their culture" to copy. J.A. at 160. Three weeks after that improper testimony, the court instructed the jury to disregard it.

Given the complete absence of evidence that Bouchat's shield drawing was received in the NFLP's New York office, the inference that the NFLP designers had access to the drawing is the result of an illogical and impermissible series of inferences. Although the old rule that disallowed the piling of inference upon inference has been abrogated, such pilings must be "well supported by the evidence. We must . . . tak[e] into consideration that its probability may be attenuated by each underlying inference." Cora Pub, Inc. v. Continental Cas. Co., 619 F.2d 482, 486 (5th Cir. 1980). In this case, the endless piling of unsupported and contradicted inference upon inference upon inference rises to the level of absurdity.

2.

In the copyright context, a special requirement of access has been established to prevent exactly the sort of problem this case presents. Other federal courts, perhaps after seeing a dizzying array of meritless copyright claims, have offered insight into the problem. In Meta-Film Assocs. v. MCA, Inc., 586 F. Supp. 1346 (C.D. Cal. 1984), for example, the court rejected a claim of infringement over an unsolicited script sent to a movie studio that eventually produced the movie "Animal House." In doing so it observed that "[i]n such a business [film production], countless unsolicited scripts are submitted to numbers of individuals on studio lots every day. Under these circumstances, it is clearly unreasonable to attribute the knowledge of any one individual . . . to every other individual just because they occupy offices on the same studio lot."

The New York federal courts have frequently dealt with instances of a plaintiff coming forward with a "bare corporate receipt," alleging that he or she sent unsolicited material to various well-known companies. The plaintiff later sues when a similar work is produced. These decisions have been steadfast in holding that access cannot be permissibly inferred from such "bare corporate receipt." See Dimmie v. Carey, 88 F. Supp. 2d 142, 146-49 (S.D.N.Y. 2000) (rejecting claim of infringement on Mariah Carey song where plaintiff alleged sending tape to Columbia Records, then theorized Carey's eventual access by a "series of uncertain inferences" not unlike those offered by Bouchat); Tisi v. Patrick, 97 F. Supp. 2d 539, 547-48 (S.D.N.Y. 2000) (rejection of "bare corporate receipt" as proof of access under similar facts); Cox v. Abrams, 1997 WL 251532 (S.D.N.Y. May 14, 1997) (unpublished); Novak v. National Broad. Co., 752 F. Supp. 164 (S.D.N.Y. 1990).

Indeed, this is not the first time the NFL has been alleged -- on unsupported facts -- to have infringed other artistic work in creating a design. See Grubb v. National Football League Properties, Inc., 901 F. Supp. 36, 39 (D. Mass. 1995) (refusing to "discredit the testimony" of numerous defense witnesses, responsible for the production of a new logo for the New England Patriots, that they had never seen the plaintiff's proposed logo, when the plaintiff had "not shown any evidence" of access).

The facts here resound of those above. These cases typically involve similar litigation over successful movies, books, songs or other artistic works.

Inevitably, a plaintiff comes forward claiming to have thought of the idea first -- only to have no evidence, except for having sent his or her work to a corporation or person affiliated with the alleged infringer.[6] While some also have proof that somebody read their work, many do not.[7] But where the proof is extraordinarily thin and based on a chain of unsupported and fanciful inferences, the courts have rightfully found the access requirement unmet. In stark contrast to this insight, the majority dismantles the access requirement by allowing a tenuous, unproved, contradicted, and inconsistent chain of inferences to satisfy Towler and prove access. This guts the entire purpose of the access requirement, and it will inevitably lead to further jury verdicts ad absurdum.

IV.

After incorrectly concluding that Bouchat had met his burden of showing access under Towler, the majority unnecessarily adopts a new legal principle -- the

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[6] Indeed, Dimmie, supra, involved the second plaintiff to bring a claim of infringement against Mariah Carey over the song "Hero." An earlier case, described by the court as a "complete fabrication," was also dismissed. See Selletti v. Carey, 177 F.R.D. 189, 193 (S.D.N.Y. 1998).

[7] At least two recent cases have indicated that the lack of "concrete evidence" of actual receipt "such as a postage receipt or an entry in . . . submission log[s]" can be dispositive of a claim of access based merely on corporate receipt. See Tomasini v. Walt Disney Company, 84 F. Supp. 2d 516, 520 (S.D.N.Y. 2000); Dimmie, 88 F. Supp. 2d at 146 (S.D.N.Y. 2000).

"strikingly similar" doctrine.[8] The majority concludes that, even if the plaintiff had not met the burden of showing access, the "striking similarity [between the plaintiff's original work and the alleged infringing work] is one way to demonstrate access." Ante at 7. That is, based on the striking similarity between Bouchat's shield drawing and the Ravens shield logo, Bouchat is entitled to an inference that the defendants had a reasonable opportunity to view and thereby copy his work.

A.

This is an interlocutory appeal under the provisions of 28 U.S.C. § 1292(b). The issues presented are: (1) Was the plaintiff's proof of a reasonable possibility of access legally insufficient? (2) If so, will the Fourth Circuit adopt the `strikingly similar' doctrine inferring access as expressed in Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988)?" J.A. 1328-29 (emphasis added). After holding that the plaintiff's proof of access

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8 The majority concedes that we have never adopted the "strikingly similar" doctrine. In the only case in which we have addressed this issue on the merits, albeit in an unpublished decision, we expressly rejected the adoption of the doctrine. See Takeall v. Pepsico, Inc., No. 93-1237, 1993 WL 509876 (4th Cir. Dec. 8, 1993). In Takeall, the plaintiff urged us to adopt a "per se rule regarding the elimination of the need for proof of access in cases involving `striking similarity.'" Id. at *4. Relying on the Second Circuit's decision in Gaste v. Kaiserman, we observed that while "striking similarity alone can raise an inference of copying, that inference must be reasonable in light of all the evidence." 1993 WL 509876, at *5 (quoting Gaste, 863 F.2d at 1068). Accordingly, we rejected the plaintiff's arguments, concluding that adoption of such a per se rule would be "inadvisable and unsupported by law." Id.

was not insufficient, the majority had no reason to answer the second question. It does so nevertheless and, in my view, does so incorrectly.[9]

Relying on Gaste and the Seventh Circuit's decision in Selle v. Gibb, the majority adopts the "strikingly similar" doctrine, which holds that "striking similarity is circumstantial evidence of copying, thereby supporting an inference of access." Id. In Gaste, the Second Circuit described the contours of the doctrine as follows:

> Though striking similarity alone can raise an inference of copying, that inference must be reasonable in light of all the evidence. A plaintiff has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of independent creation.

Gaste, 863 F.2d at 1068 (emphasis added).

Similarly, the Seventh Circuit in Selle recognized that striking similarity does not completely eliminate the need for additional proof of access:

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[9] The majority's adoption of the "strikingly similar" doctrine is unnecessary dicta, and should accordingly lack precedential value.

> [S]triking similarity is just one piece of circumstantial evidence tending to show access and must not be considered in isolation; it must be considered together with other types of circumstantial evidence relating to access. As a threshold matter, therefore, it would appear that there must be at least some other evidence which would establish a reasonable possibility that the complaining work was available to the alleged infringer. . . . The plaintiff must always present sufficient evidence to support a reasonable possibility of access because the jury cannot draw an inference of access based upon speculation and conjecture alone.

741 F.2d at 901. Based on Gaste and Selle, the majority maintains that Bouchat is entitled to an inference of access because of the striking similarity between the Ravens shield logo and his shield drawing.

B.

I am unable to join in the majority's endorsement of the "strikingly similar" doctrine. The doctrine's underlying assumption is that where two works are so strikingly similar, there is a high probability that one was copied from the other. See Gaste, 863 F.3d at 1067-68. However, this assumption, standing alone, runs contrary to a fundamental principle of copyright protection: independent creation. See Feist, 499 U.S. at 345 (recognizing that "originality," the sine qua non of copyright protection, requires independent creation and some degree of creativity). Evidence of copying -- access

plus substantial similarity -- is "crucial to any claim of copyright infringement because no matter how similar the two works may be (even to the point of identity), if the defendant did not copy the accused work, there is no infringement." 741 F.2d at 901 (citation omitted). Indeed, "two works may be identical in every detail, but, if the alleged infringer created the accused work independently or both works were copied from a common source in the public domain, then there is no infringement." Id. As Judge Learned Hand observed in Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936), aff'd, 309 U.S. 390, 392 (1940), "[I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an `author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's." Id. at 54.

However, under the majority's "strikingly similar" doctrine, one who plagiarized Keats's Ode on a Grecian Urn in 1820 would arguably be entitled to an inference of infringement-- based merely on the similarity of the two works -- against one of England's greatest poets. Such an absurd result illustrates why the requirement of proving substantial similarity should remain independent of the requirement of demonstrating access -- Keats's poem is "strikingly similar" to the hypothetical plaintiff's poem because the plaintiff copied it from him.[10] Simply put, in

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10 The panel majority has affixed to its opinion Bouchat's shield drawing and the Ravens logo, apparently to illustrate their "striking similarity" to each other. It strikes me that these drawings better illustrate the point made in the Keats' hypothetical. In fact, it is just as likely that Bouchat copied the Ravens' logo as vice versa. It bears repeating, see supra note 1, that Bouchat did not copyright his shield drawing until nearly two months after the Ravens unveiled their logo.

examining a plaintiff's circumstantial evidence of copying, proof of one element should not allow a court to infer the existence of the other.

V.

For the foregoing reasons, I have concluded that the jury's verdict in favor of Bouchat is unsupported both factually and legally, and I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 02-1999
(CA-97-1470-MJG)

FREDERICK E. BOUCHAT,
Plaintiff - Appellant,

versus

BALTIMORE RAVENS FOOTBALL CLUB, INCORPORATED, a/k/a Baltimore Ravens, Incorporated; NATIONAL FOOTBALL LEAGUE PROPERTIES, INCORPORATED,
Defendants - Appellees.

JONATHAN MORGAN,

Movant.

FILED: December 9, 2003

ORDER

Before the Court is appellant's petition for rehearing with petition for rehearing en banc. On the petition for panel rehearing, Judge Widener voted in favor thereof, and Judge Wilkinson and Judge King voted to deny. The petition for panel rehearing is thus denied.

A poll of the Court having been requested on the petition for rehearing en banc, a majority of the active judges voted to deny the same. Judge Widener voted in favor of rehearing en banc, and Chief Judge Wilkins, along with Judges Wilkinson, Niemeyer, Luttig, Michael,

Motz, Traxler, King, Gregory, Shedd, and Duncan, voted against rehearing en banc. Judge Williams, deeming herself disqualified, did not participate. Pursuant thereto, the petition for rehearing en banc is hereby also denied.

This Order is entered for the Court at the direction of Judge King.

For the Court

/s/ Patricia S. Connor
Patricia S. Connor
Clerk

17 U.S.C. § 504 (1998)

§ 504. Remedies for infringement: Damages and profits

(a) In general. Except as otherwise provided by this title, an infringer of copyright is liable for either--

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) Actual damages and profits. The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) Statutory damages.

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not

less than $ 500 or more than $ 20,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $ 100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $ 100. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

(d) Additional damages in certain cases. In any case in which the court finds that a defendant proprietor of an establishment who claims as a defense that its activities were exempt under section 110(5) did not have

reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

FREDERICK E. BOUCHAT,	*	
Plaintiff	*	
vs.	*	CIVIL ACTION NO.:
	*	MJG-97-1470
BALTIMORE RAVENS, INC.,	*	
et al.	*	
Defendants	*	

VERDICT
[Filed July 23, 2002]

SECTION ONE

1. Have Defendants proven by a preponderance of the evidence that income derived by Defendants from the sale of products bearing the Flying B logo was attributable completely to factors other than the artwork of the Flying B logo?

Yes
Yes or No

If your answer is "Yes," do not answer any further questions, your verdict is complete. If your answer is "No," proceed to Sections Two and Three and answer the remaining questions.

SECTION TWO

2. What percentage of the income derived by Defendants from the sale of merchandise bearing the Flying B logo have Defendants proven, by a preponderance of the evidence, was attributable to factors other than the artwork of the Flying B logo?

_____%

Therefore, Plaintiff shall be awarded the following percentage of said income:

Compute as 100% minus answer 2

_____%

SECTION THREE

3. What percentage of the income derived by Defendants from the sale of soft drinks in souvenir cups at Baltimore Ravens home Football games have Defendants proven, by a preponderance of the evidence, was attributable to factors other than the artwork of the Flying B logo?

_____%

Therefore, Plaintiff shall be awarded the following percentage of said income:

Compute as 100% minus answer 3

_____%

The foregoing constitutes the unanimous verdict of the jury.

Date: 7/24/02
2:00 PM

Zachary Taylor
Foreperson

[Excerpt from Respondents' Closing Argument
July 23, 2002]

* * *

[Tr. 862]

A working wage, that is not his interest. No way. You know something much more than that, don't you? As utterly undeserved.

* * *

[Tr. 902]

And where was Mr. Bouchat while we are at it? He is here. Why didn't he testify? Why didn't he say why he is entitled to a percentage? Why his claim is even marginally logical, marginally logical or credible? What does that tell you? He is right there. Been here all trial. Either he couldn't, or he wouldn't, help himself if he testified. That is why.

Or, more than likely, he would have hurt himself if he had testified. That is what would have happened, and that is why he didn't testify. You should assume the worst from his failure to testify.

This case is about one thing and one thing only, and you now know it because you know what people are paid for logos, and you sure know a lot more than that. A lot more than what is spent on logos is being spent on the litigation in this case for both sides. You know that.

Well, if it was about the wage, if it was about the wage, its real value, we wouldn't be here, would we?

* * *

[Tr. 905]

You give him more, something like this, you have more than doubled what one would consider a handsome wage for his contribution, as it were, because that is how artwork is valued.

* * *

[Tr. 906-907]

He wants to shoot for the moon. He wants the pot of gold. He wants the allocation. He could have come in and asked the jury for reasonable compensation. Hey, I produced this; I get credit for it. I drew it; pay me what it is worth. Pay me market. Pay me going rate. Pay me a premium maybe because you used it. Pay me an extra hundred bucks. Whatever. Pay me a thousand bucks.

He didn't do that. It is not what he is after. He is relying on you to do something that you shouldn't, and I don't think you will.

* * *

[Tr. 914]

I pre-cleared the law with the Judge when I talked to him about the compensation, a thousand dollars for a single piece of logo artwork. The reason that is suggestive of what Mr. Bouchat's contribution to the NFL revenue stream is–and I pre-cleared it with the judge.

[Excerpt from Jury Instructions July 23, 2002]

[Tr. 810-815]

I want to deal now with the verdict form which we have reviewed once, and if you will bear with me there is bit of repetition here, but I think it is critical and then I want to talk about final arguments.

Would you hand out the revised verdict sheet.

As you are going to see, this verdict sheet has the exact same questions that we covered before. The only difference is if you look at the second page. Question two is the same as the last question, and then below that there is a line that tells you the significance of the answer.

I am going to go through the verdict sheet and I will come to that explanation. I do not think we are talking about complex rocket science, but I thought it was important to have this as clear as possible.

So what I am going to do now, and bear with me, but let me read with you again, with a slight modification to explain the little change there, the verdict explanation, and I read this because I have gotten these words at least approved by counsel or at least, I don't want to vary from them.

Question one asks have the defendants proven by a preponderance of the evidence that income derived by the defendants from the sale of products bearing the Flying B logo was attributable completely to factors other than the artwork of the Flying B logo.

And in the context of this case, the word attribution is best defined as the assigning of an affect to a cause, to quote one of the definitions presented in the Oxford English dictionary. Therefore, the term attributable to means motivated by or caused by, to be concrete. The.

Defendant's position is that customers buying products bearing the Flying B logo were not motivated by the artwork of the logo, rather the defendant's contend that customers were motivated to obtain the merchandise by their desires to obtain the products itself for its normal use. Their desires to obtain a product bearing the team name or any Ravens' symbol without concern for the particular artwork, and for additional causes other than the artwork, the Flying B logo.

Mr. Bouchat contends that among the factors motivating customers to obtain products bearing the Flying B logo was the particular artwork of the logo. If you answer question one yes, the defendants would have proven to you that no part of the income derived from the sale of products bearing the Flying B logo was attributable to the artwork of the logo.

This would mean that you had decided that 100 percent of the income derived from the sale of such products was attributable to factors other than the artwork of the log and there would be no need to answer questions two and three.

If you answer no to question one, then you must answer questions two and three. Question two asks what percentage of the income derived by defendants from the sale of merchandise bearing the Flying B logo have

defendants proven by a preponderance of the evidence was attributable to factors other than the artwork of the Flying B logo.

The term attributable to has the meaning I just stated. The word merchandise is used here to mean all products that are in evidence except for soft drinks in souvenir cups which are the subject of question three.

You must decide the extent to which defendants have proven that income derived from the sale of merchandise bearing the Flying B logo was attributable to factors other than the artwork of the logo, in this regard as noted above, defendants contend that 100 percent of the income was attributable to customer's desires to obtain the product itself for its normal use. Customer's desires to obtain a product bearing the team name or any Ravens' symbol without concern for the particular artwork and for additional causes other than the artwork of the Flying B logo.

Plaintiff contends that some percentage of the income derived from the sale of products bearing the Flying B logo was attributable to the artwork of the logo. So if you look at Section two and question two, and if you get to this, you would fill in some percentage in response to question two.

The next line says therefore, plaintiff shall be awarded the following percentage of said income. Compute as 100 percent minus answer two. What that means I think is self-explanatory, and I cannot use a number as an example because the parties don't want me to.

You put some number in the answer to question number two, that some percentage that you have decided based upon the evidence, you then take 100 percent minus whatever that number is and that balance is the amount that plaintiff shall be awarded.

There is in evidence the amount of such merchandise income. There is in evidence what that amount is and the number, don't hold me to this because I don't have it. Two million, one hundred thousand or something. Whatever that number is, it is in evidence and the plaintiff would be awarded whatever the percentage is there of the two million dollars.

Let's go to question three. Question three sks what percentage of the income derived by defendants from the sale of soft drinks in souvenir cups at Baltimore Ravens' home football games have defendants proven by a preponderance of the evidence was attributable to factors other than the artwork of the Flying B logo.

This is essentially the same as question two, except that the question addresses only soft drink sales in souvenir cups at home games. You may decide that the answer to question three is the same or is different from the answer to question two. There again, the amount of that income is in evidence. It is about $411,000. Again, you have the exact number. You would take, you just do the arithmetic. You find the answer to number three, subtract that from 100 percent and that balance is the percentage of the $411,000 that is awarded to the plaintiff.

Let me note that, as stated in each question, the defendants have the burden of proof by a preponderance of the evidence. I want to explain this. This is a civil and

there is no burden of proof beyond a reasonable doubt. In this civil case the defense has the burden of proof by what is called a preponderance of the evidence.

* * *

[Excerpt from Petitioner's Exceptions July 22, 2002]
[Tr. 779-783]

MR. SCHULMAN: Yes, it is Plaintiff's Proposed Statement of Background Facts. I thought that I was required under the rules to read it.

THE COURT: I don't think you are required to read it if you make it an exhibit. It is like any other written submission. But we will take it as a hearing exhibit. It is rather lengthy, so I don't see the point in reading it.

MR. SCHULMAN: It is two pages of single space, but what it is is the quotation --

THE COURT: Let me ask you this. Can the Court reporter retype?

MR. SCHULMAN: Yes.

THE COURT: Just give it to the court reporter and let the record deem Mr. Schulman to have read that.

MR. SCHULMAN: And it will be from Bouchat vs. Baltimore Ravens, 241 Md., pages 352 and 353.

THE COURT: Thank you. Please insert that in the transcript.

INSERT:
Plaintiff's Proposed Statement of Background Facts.

The Plaintiff, Frederick E. Bouchat, by his attorneys, Howard J. Schulman and Schulman and Kaufman, LLC, hereby submits a statement of background facts for the jury, as follows:

From the Fourth Circuit's opinion in Bouchat v. Baltimore Ravens, Inc., 241 F.3d 350, 352-53 (4th Cir. 2000), Plaintiff proposes the following quoted language:

Frederick Bouchat is an amateur artist. He has a ninth-grade education, and now works as a front entrance security guard at the State of Maryland Office building on St. Paul Street in Baltimore. Bouchat often showed his artwork to people passing through the building's main entrance.

As news of an NFL team for Baltimore spread in 1995, Bouchat created drawings and designs for the team based on his favorite possible team name-- the Ravens. Bouchat created a helmet design and affixed his creation to a miniature football helmet. Bouchat gave the design and helmet to Eugene Conti, a state official who worked in the St. Paul Street office building. Conti kept the helmet displayed in his office. Bouchat showed other team drawings to employees of the building and gave away two drawings as holiday gifts in December of 1995.

Conti asked a colleague to arrange a meeting between Bouchat (an enthusiastic Baltimore fan) and John Moag, chairman of the Maryland Stadium Authority (the man who brought the team to Baltimore) in order to include a story about Bouchat in the employee newsletter. On March 28, 1996 (the day before the new team announced that it would be called the Ravens), Bouchat was taken to meet Moag at Moag's law office on Pratt Street. The Ravens and David Modell (the team's owner) occupied the same office suite in the Pratt Street building as a temporary space at this time.

At the meeting, photos were taken and Moag told Bouchat that the team was going to be named the Ravens. When Bouchat described his drawings, Moag told Bouchat to send his drawings along, and Moag would give them to the Ravens for consideration. The next day, Bouchat got permission from his supervisor to use the office fax machine in order to send his drawings to Moag at the Maryland Stadium Authority (MSA). Jan Drabeck, Bouchat's immediate supervisor, showed Bouchat how to use the fax machine.

On April 1 or 2, 1996, Bouchat faxed his drawings to the MSA. He received a fax confirmation but did not retain the printed confirmation receipt. One of the drawings Bouchat faxed to the MSA was his shield drawing. (In his fax, Bouchat requested a letter of recognition and an autographed helmet for his design.)

On April 2, 1996, Modell met with the NFL Properties Design Director to discuss the development of a Ravens logo. Thereafter, Modell communicated with the design team concerning the logo project. The Ravens unveiled their new logo in June of 1996. The new Ravens logo was a Raven holding a shield.

Bouchat and several of his co-workers immediately recognized the new logo as Bouchat's work ... . In May of 1997 Bouchat filed this lawsuit against the Ravens and NFL Properties for infringing his copyright on the design at issue. In November of 1998, the jury returned a verdict in favor of the plaintiff, but only as to his shield drawing.

THE COURT: Anything else?

MR. SCHULMAN: That would conclude plaintiff's exceptions, Your Honor.

[Excerpt from Court's Preliminary Statement
to Jury July 17, 2002]
[Tr. 202-205]

In late October of 1995, the Cleveland football team decided to move to Baltimore with possibly a team name different from the Browns. On or about December 5, 1995 plaintiff, Frederick Bouchat, a Baltimore resident with no connection to the team, created a drawing that is the art work at issue in this case.

In March of 1996, the team selected the name Ravens. In early June of 1996 the Ravens first publicly displayed the team uniforms and these team logos. This is the logo design sheet that was publicly displayed in June of 1996. As you will hear, the team logos were used by the team in connection with operations, for example, on stationery, on tickets, on banners, and players uniforms, etcetera. You will not be deciding any questions about such uses, and I will decide the issues relating to these matters.

As pertinent to the questions you will decide, team logos were placed on products, merchandise sold to the public. For many years, certainly the entire time relevant to the instant case, the National Football League, through its merchandising arm named NFL Properties licensed various manufactures to use its team logos in return for payment of a royalty based upon the amount of the proceeds of sale.

Therefore, if a manufacturer sold a licensed T shirt to a retailer for $10 and there was a 10 percent royalty rate, NFL Properties would receive a royalty of $1 on the

sale of NFL Properties, then distributed its profits to the teams in the league.

You should note that the manufacturer who got the license obtained the right to use all logos of all times. Of course, some teams were more popular than others, so that, for example, there were far more sales of merchandise bearing the logos of the Dallas Cowboys than the Cincinnati Bengals. Starting in June of 1996, manufacturers with licenses from the NFL started to produce and sell merchandise bearing the Flying B logo.

In the fall of 1998, this Court resolved various issues and decided that plaintiff was the creator of the art work of the Flying B logo. As such plaintiff has certain rights in regard to the art work of the Flying B logo. Plaintiff does not, however, claim or have any rights in regard to the use of the name Ravens.

In early 1999 the team decided to stop using the Flying B logo. It is now necessary to decide how much will be awarded to plaintiff with respect to the art work in the Flying B logo.

Through a long and tedious accounting process, with which fortunately you need not be concerned, there has been a determination of the revenue derived by the defendants with respect to the sale of products bearing the Flying B logo. It is now necessary to determine the extent to which the revenue derived from the sale of these products is attributable to factors other than the art work of the Flying B logo.

In this case, the burden of proof is on the defendants to prove the extent to which the revenue derived from the sale of these products is attributable to factors other than the art work of the Flying B logo. The defendants contend that customers who purchased merchandise bearing the Flying B logo were motivated by reasons other than the art work of the Flying B logo as commercial art.

The defendants contend that the customers were motivated by other factors, such as, for example, a desire to have the product for its inherent use, for example, a hat to cover one's head. A desire to have a product bearing the team name or any Ravens' symbol without concern for the particular art work, and other reasons that they will present to you. Plaintiff contends that customer's decision to buy merchandise bearing the Flying B logo were motivated by the art work of the Flying B logo.

At the conclusion of the evidence I, will give you my final instructions on the law and you will then be asked to render your verdict.

* * *

[Excerpt from Proceedings July 15, 2002]

[Tr. 33]

MR. SCHULMAN: May I have a couple of comments so the Court understands where I am?

We are still at the position where the statement of facts of the Fourth Circuit is an appropriate one, but given the Court appears not inclined to give that I would also raise the issue -

THE COURT: No, but I have invited everybody to give me any facts, particularly -- for example, that they think should be in it that would be relevant to the jury and not prejudicial to one side or the other.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

FREDERICK E. BOUCHAT,	*
Plaintiff	*
v.	*
BALTIMORE RAVENS, INC., et al.	*
Defendants	*
* * * * * * *	

CIVIL ACTION NO.: MJG-97-1470

PLAINTIFF'S PROPOSED STATEMENT OF BACKGROUND FACTS

The Plaintiff, Frederick E. Bouchat, by his attorneys, Howard J. Schulman and Schulman & Kaufman, LLC, hereby submits a statement of background facts for the jury, as follows:

From the Fourth Circuit's opinion in *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350, 352-53 (4th Cir. 2000), Plaintiff proposes the following quoted language:

> Frederick Bouchat is an amateur artist. He has a ninth-grade education, and now works as a front entrance security guard at the State of Maryland Office building on St. Paul Street in Baltimore. Bouchat often showed his artwork to people passing through the building's main entrance.
>
> As news of an NFL team for Baltimore spread in 1995, Bouchat created drawings and designs for the team based on his

favorite possible team name -- the Ravens. Bouchat created a helmet design and affixed his creation to a miniature football helmet. Bouchat gave the design and helmet to Eugene Conti, a state official who worked in the St. Paul Street office building. Conti kept the helmet displayed in his office. Bouchat showed other team drawings to employees of the buildi g and gave away two drawings as holiday gifts in December of 1995.

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At the meeting, photos were taken and Moag told Bouchat that the team was going to be named the Ravens. When Bouchat described his drawings, Moag told Bouchat to send his drawings along, and Moag would give them to the Ravens for consideration. The next day, Bouchat got permission from his supervisor to use the office fax machine in order to send his

drawings to Moag at the Maryland Stadium Authority (MSA). Jan Drabeck, Bouchat's immediate supervisor, showed Bouchat how to use the fax machine.

On April 1 or 2, 1996, Bouchat faxed his drawings to the MSA. He received a fax confirmation but did not retain the printed confirmation receipt. One of the drawings Bouchat faxed to the MSA was his shield drawing. [In his fax, Bouchat requested a letter of recognition and an autographed helmet for his design.]

On April 2, 1996, Modell met with the NFL Properties Design Director to discuss the development of a Ravens logo. Thereafter, Modell communicated with the design team concerning the logo project. The Ravens unveiled their new logo in June of 1996. The new Ravens logo was a Raven holding a shield.

Bouchat and several of his co-workers immediately recognized the new logo as Bouchat's work. ... . In May of 1997 Bouchat filed this lawsuit against the Ravens and NFL Properties for infringing his copyright on the design at issue. In November of 1998, the jury returned a verdict in favor of the plaintiff, but only as to his shield drawing.

/s/ HOWARD J. SCHULMAN
HOWARD J. SCHULMAN
SCHULMAN & KAUFMAN, LLC
One Charles Center, Suite 600
100 N. Charles Street
Baltimore, Maryland 21201
(410) 576-0400
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FREDERICK E. BOUCHAT,	*
Plaintiff	*
v.	*
BALTIMORE RAVENS, INC., et al.,	*
Defendants	*

CIVIL ACTION NO.: MJG-97-1470

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO TRADING CARDS, VIDEO GAMES, MULTIPLE MARKS AND OTHER MERCHANDISE

Now comes the Plaintiff, Frederick E. Bouchat, by his attorneys, Howard J. Schulman and Schulman & Kaufman, LLC, and, in response to Defendants' Motion for Partial Summary Judgment, states:

1. Defendants, in a rush to market, used the infringing work because they wanted to create a pictorial identity that would be enduring and distinctly unique to Baltimore and that would communicate a long term commitment and association with the City and the State of Maryland while aesthetically distancing itself from bird symbols in other logos. Defendants used the infringing work, which embodies Plaintiff's creativity, as a corporate mark and symbol to communicate to third parties a particular message, identity, and characteristics that would meet the marketing needs of their licensees.

Defendants used Plaintiff's work for the purpose of creating the corporate identity of the new football franchise in Baltimore because that is what Defendants believed would help sell their products in Baltimore.

2. The plain language of 17 U.S.C., § 504(b) and the legislative history supporting this subsection are unmistakably clear that Plaintiff need only prove Defendants' gross revenue associated with the use of the logo on consumer merchandise and products to establish a presumption of Defendants' profits (a *prima facie* case) and that the burden of production and persuasion then shifts to the Defendants to prove the elements of profit attributable to other factors – causation is the burden of the defendant to rebut the statutory presumption that all revenue associated with the use was wrongfully obtained. Under this statutory mandate, it is the Defendants' burden to disprove a causal connection between the logo and the revenue. Even without any meaningful discovery concerning matters raised in Defendants' motion, Defendants' licensees clearly paid royalties for the sale of specific products bearing or using the infringing work. Thus, Plaintiff has established a *prima facie* case, and the matters raised by the Defendants in their motion are questions for the jury. *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 567 (1985); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940); *Walker v. Forbes,* Inc., 28 F.3d 409, 414 (4th Cir. 1994); *Konor Enterprises, Inc. v. Eagle Publications, Inc.*, 878 F.2d 138, 140 (4th Cir. 1989).

3. The affidavits of Defendants' employees and business partners are insufficient to overcome the statutory presumption. *See Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133, 149-51 (2000) ("a court should give

credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses."), quoting 9A C. Wright & A. Miller, Federal Practice and Procedure § 2529, p. 299 (2d ed. 1995). In other respects, Defendants do not sufficiently support their motion, for those reasons set forth in the accompanying motion to strike and supporting memorandum.

4. Defendants did not identify their affiants or factual assertions in their answers to interrogatories. *See* Fed.R.Civ.P. 37(c)(1).

5. Attached are the affidavits of John Burns and undersigned counsel in opposition to summary judgment, which affidavits controvert the generalized assertions contained in Defendants' affidavits.

WHEREFORE, for the aforementioned reasons and those stated in the accompanying Memorandum of Law, Plaintiff, Frederick E. Bouchat, respectfully requests that this Court deny the Defendants' Motion for Partial Summary.

/s/ Howard J. Schulman
Howard J. Schulman
SCHULMAN & KAUFMAN, LLC
One Charles Center, Suite 600
100 N. Charles Street
Baltimore, Maryland 21201
(410) 576-0400
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

FREDERICK E. BOUCHAT,	*
Plaintiff	*
v.	*
BALTIMORE RAVENS, INC., et al.,	*
Defendants	*

CIVIL ACTION NO.: MJG-97-1470

AFFIDAVIT OF COUNSEL

1. My name is Howard J. Schulman. My business address is One Charles Center, Suite 600, 100 N. Charles Street, Baltimore, Maryland 21201. I am an attorney. I am over 21 years of age. I am competent to testify and have personal knowledge of the matters set forth herein.

2. Attached hereto is a true and accurate copy of a Don Russ trading card from Plaintiff's private trading card collection (Trial Exhibit 259) which reflects Eric Zeier in a Cleveland Browns uniform with, however, the infringing logo superimposed on the front and back of the card.

Pursuant to 28 U.S.C., § 1746, I affirm under the penalty of perjury that the foregoing is true.

/s/ Howard J. Schulman
Howard J. Schulman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

FREDERICK E. BOUCHAT,	*
Plaintiff	*
v.	*
BALTIMORE RAVENS, INC., et al.	*
Defendants	*

CIVIL ACTION NO.: MJG-97-1470

AFFIDAVIT OF JOHN E. BURNS

1. My name is John E. Burns. My business address is Citation Investigation Agency, 5005 Wards Chapel Road, Owings Mills, Maryland 21117. I am a licensed private investigator. I am over 21 years of age. I am competent to testify and have personal knowledge of the matters set forth herein.

2. Attached hereto are photocopies of Fleer trading cards in their packaging that I personally purchased at the Dugout Zone, 647 Ridge Road, Eldersburg, Maryland on May 21, 2002.

3. Attached hereto is a photocopy of a pack of 75 football cards in their packaging which I personally purchased at the Sports Authority, 6510 Baltimore National Pike, Baltimore, Maryland 21228 on May 20, 2002.

4. Attached hereto are photocopies of the exterior wrappings of Topps trading cards which I personally purchased on May 20, 2002 at the Dugout Zone, 647 Ridge Road, Eldersburg, Maryland 21784.

5. Attached hereto are photocopies of trading cards in their wrappings which I personally purchased from Jay Sports Collection, 49 West Aylesbury Road, Timonium, Maryland on May 23, 2002.

6. Attached hereto are photocopies of three clear, flexible plastic packages that I personally purchased at AB Dick's on October 2, 2001. Each package has a pack of trading cards within it with Peyton Manning on the card packaging. Enclosed in each of the packages is a pin bearing the Flying B logo. Each pin is different. One pin says "Feel the power", the second pin has the logo on a football helmet with a football and lettering "Baltimore Ravens" on it, and the third pin simply has the logo on it. Attached hereto are photocopies of the front and back of the packaging.

7. Attached hereto are photocopies of the front and back of three Fleer trading cards in their packaging that I personally purchased at Great Moments, 471 Baltimore Boulevard, Westminster, Maryland 21157 on May 24, 2002.

Pursuant to 28 U.S.C., §1746, I affirm under the penalty of perjury that the foregoing is true.

/s/ John E. Burns
John E. Burns

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(410) 962-4560
(410) 962-3630 FAX

CHAMBERS OF
PAUL W. GRIMM
UNITED STATES MAGISTRATE JUDGE

October 1, 2001

RE: *Bouchat v. Ravens, et al.*
MJG-97-1470

MEMORANDUM FOR COUNSEL
[Entered October 3, 2001]

Dear Counsel:

I am writing on behalf of Judge Garbis and myself, regarding Mr. Shulman's motion for discovery of sponsorship and media use, the defendants' opposition letter of September 24, 2001, and Mr. Shulman's reply letter of September 26,2001.

A balancing of the Rule 26(b)(2) factors necessitates a ruling that, except for the deposition of Mr. Schwebel, a Rule 30(b)(6) witness of the defendant NFL, which Judge Garbis has authorized, the determination whether the plaintiff should have additional discovery into sponsorship and media use information properly is deferred until after a ruling on the pending motions. In the event that Judge Garbis believes that additional

discovery is needed to assist him in ruling on the pending motions, he will advise the parties accordingly. If there is any need for the discovery plaintiff seeks after rulings have been made, counsel may seek to take it at that time.

This informal ruling is an order of the Court, to be docketed as such.

/s/ Paul W. Grimm
Paul W. Grimm
United States Magistrate Judge

cc: Honorable Marvin J. Garbis
Clerk
Chambers File

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

FREDERICK E. BOUCHAT, *
Plaintiff *

v. *

BALTIMORE RAVENS, INC., et al *
Defendants *

CIVIL ACTION NO.: MJG-97-1470

CORRECTED RULE 56(f) AFFIDAVIT OF COUNSEL
[Filed August 13, 2001]

1. My name is Howard J. Schulman. My business address is Schulman & Kaufman, LLC, 100 Light Street, Suite 1330, Baltimore, Maryland 21202. I am Plaintiff's counsel in this case. I have personal knowledge of the matters set forth herein. I am over 21 years of age. I am competent to testify.

2. Reference is made to the first sentence of Paragraph 6 at page 6 of my Affidavit submitted to the Court on July 23, 2001. Please correct the sentence by adding the word "advertisements" and to read:

> I have in my possession videotapes of some Ravens' football games, in which the logo is clearly used and displayed during ticket sales **advertisements** for individual games.

Pursuant to 28 U.S.C., §1746, I affirm under the penalty of perjury that the foregoing is true.

/s/ Howard J. Schulman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FREDERICK E. BOUCHAT, *

Plaintiff *

v. *

BALTIMORE RAVENS, INC., et al. *

Defendants *

CIVIL ACTION NO.: MJG-97-1470

RESPONSE TO DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT
[Filed July 23, 2001]

Now comes the Plaintiff, Frederick E. Bouchat, by his attorneys, Howard J. Schulman and Schulman & Kaufman, LLC, and, in response to Defendants' Motion for Partial Summary Judgment, states:

1. This case is unique in that it involves possibly the largest and most pervasive use and authorization to use a copyrighted work by a commercial enterprise recorded. The massive scale and scope of the infringement by a powerful and sophisticated business entity which encompasses virtually every facet of Defendants' business dealings are unprecedented.

2. Defendants, in a rush to market, used the infringing work because they wanted to create a pictorial identity that would be enduring and distinctly unique to

Baltimore and that would communicate a long term commitment and association with the City and the State of Maryland while aesthetically distancing itself from bird symbols in other logos. Defendants used the infringing work, which embodies Plaintiffs' creativity, as a corporate mark and symbol to communicate to third parties a particular message, identity, and characteristics that would meet the marketing needs of their sponsors and media sponsors. Defendants used Plaintiff's work for the purpose of creating the corporate identity of the new football franchise in Baltimore, in order to market the team through advertisements and an on-going and continuing identity campaign, all for the purpose of selling more game tickets and merchandise and for increasing overall revenue. Defendants received revenue from sponsors and media entities in exchange for the authorization to use the infringing work.

3. The plain language of 17 U.S.C., § 504(b) and the legislative history supporting this subsection are unmistakably clear that Plaintiff need only prove Defendants' gross revenue associated with the use of the logo to establish a presumption of Defendants' profits (a *prima facie* case) and that the burden of production and persuasion then shifts to the Defendants to prove the elements of profit attributable to other factors – causation is the burden of the defendant to rebut the statutory presumption that all revenue associated with the use was wrongfully obtained. Under this statutory mandate, it is the Defendants' burden to disprove a causal connection between the logo and the revenue. Even without any meaningful discovery concerning revenues, Plaintiff has identified specific lines of revenue related to the Defendants' use of the logo in question. Thus, Plaintiff has established a *prima facie* case, and the matters raised

by the Defendants in their motion are questions for the jury. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 567 (1985); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940); *Konor Enterprises, Inc. v. Eagle Publications, Inc.*, 878 F.2d 138, 140 (4th Cir. 1989).

4. Plaintiff believes that the substantive legal issues are ripe for decision at this juncture, particularly given nearly a five month delay in discovery that Defendants' motion has caused. To the extent that the information submitted by the Plaintiff is not in a form required by Fed.R.Civ.Pro. 56(e) or sufficient to generate a material dispute of fact concerning the Defendant Ravens' ticket sales and related revenues, Plaintiff's affidavit and the affidavit of his counsel contain a request and state a sufficient basis under Fed.R.Civ.Pro. 56(f) to continue the consideration of the Defendants' motion until the completion of discovery.

WHEREFORE, for the aforementioned reasons and those stated in the accompanying Memorandum of Law, Plaintiff, Frederick E. Bouchat, respectfully requests that this Court deny the Defendants' Motion for Partial Summary.

_____

Howard J. Schulman
SCHULMAN & KAUFMAN, LLC
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Baltimore, Maryland 21202
(410) 576-0400
Attorneys for Plaintiff

[Filed July 23, 2001]

FAX Transmission
PATTON BOGGS, L.L.P.
250 West Pratt Street
Suite 1100
Baltimore, Maryland 21201
(410) 659-5600
TELECOPIER (410) 569-0621

To:	Bruce Burke
Fax Number:	212-750-3442
From:	David Modell
Client Number:	
Date:	
Total Number of Pages: (*including cover page*)	7

CONFIDENTIALITY NOTICE: This facsimile contains CONFIDENTIAL INFORMATION which may also be LEGALLY PRIVILEGED and which is intended only for the use of the Addressee(s) named above. If you are not the intended recipient or the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any dissemination or copying of this facsimile, or the taking of any action in reliance on the contents of this telecopied information, is strictly prohibited. If you have received this facsimile in error, please immediately notify us by telephone and return the original facsimile to us at the above address via the Postal Service. Thank you!

Original will not follow Original will follow via:

COMMENTS:

Confidential Raven's Marketing & Sales Memo

To: Bruce Burke, Gary Gertzog
Fr: David O. Modell
Re: Keeping Y'all in the Loop

Attached is the portion of our weekly M&S update dealing with the name and colors sitch. Thought I'd send to you guys to make sure I've not missed anything.

Have a great day!

D.

The contents of this faxed memorandum are confidential and should be delivered to and read only by addressees. Violation is governed by the law of the Raven. If any unauthorized person should read this document a huge motherf#@&*r of a black bird will swoop down upon you and peck your eyes out. Don't mess with the Raven!

Logo, Colors and Uniform Design Update

Met with Bruce Burke and NFLP in New York on Tuesday of this past week. We had a several hour meeting in which the discussion ranged from how we saw the logo, colors and uni designs to timing of their creation.

Following is a synopsis of those discussions:

Our Guiding Principles:

1. logo/uni should focus on fan's likes and dislikes

   Given the fact we have gone through the process of obtaining through focus groups an idea of how we are viewed and how Baltimoreans view themselves and their town – it would be foolhardy to not allow this info to help shape the vision of what eventually will be our insignia and colors.

   As a reminder, Balts see themselves and their (our) town as hard working, down to earth, not flashy. Thus, if we were to deploy a logo that was flashy and glitzy it would not get good marks locally.

2. logo/uni should amplify attitude of team

   I made the assumption that what we attempt to develop as an attitude of our new team will mirror the attitude of our old team.

Amazingly I sense these attributes are fairly similar to how the fans see themselves and this community: hard-working, not flashy, down to earth. Add to that toughness, sticktoitiveness, resourcefulness and an overwhelming desire to win and we are led to a more serious logo and color-palette approach versus a cartoonish "Mighty Ducks" kind of approach

(Incidentally, NFLP did have a cartoonish Raven logo which had been developed in consideration of the "Boogian" expansion effort. I assumed we did not want a "Boogian" Heckle and Jeckle as our magpie logo so I dinged it instantly.)

3. logo/uni should have some 21st century touches

To complicate matters, while the previously outlined thoughts lead us to a more 'conservative' approach, I did remind Bruce that we are all staring down the barrel of the 21st century and to ignore attempting to make a timeless yet impactful statement would be a mistake. So, I asked him to consider adding 21st century accents to the overall approach (such as a non-standard typeface for name and number, logo accents on the braid of the trouser - that kind of jazz). Some of the existing team uni re-designs incorporated some of these accents and I thought they looked neat but not silly.

Environmental Concerns:

1. Time is a serious concern for all parties involved. We need uniforms and practice wear, stores need product, manufacturers need designs to accomplish both.

In order to accomplish all this before Christmas, we must:

- adhere to all deadlines presented us by the design group (specifically we must sign off on team colors, primary logo, and uniform designs on paper by May 17 then sign off on physical home and away uni designs by June 1).

- have a first year uni design that does not have much accent - it's just gonna be a tad vanilla for the first year. I will suggest to NFLP that we then make modifications for year #2 that adds some accents as discussed previously in this memo.

2. NFL and NFLP says:

- we will play ALL preseason games in white on white - opponents must be alerted to this fact asap which both Eddie Carroll and I should do with our various contacts.

NFLP Design Group Schedule:

Please review NFLP's design schedule carefully so that process and deadlines are understood. Schedule is on following page.

Date Range	Activity	Meeting/Decision Dates
March 25 to April 16	• Research • Preliminary logos • Preliminary logotypes • Preliminary color • Present to Raven Logo Team	April 16 in New York
April 17 to May 3	• Refine logos • Refine logotypes • Refine color • Preliminary uni design • Present to Raven Logo Team	May 3 in Baltimore
May 3	• Focus group	May 3 in Baltimore (Mandatory RLT attendance)

Possible Logo Release at this Time

May 6 to May 17	• Refine logos • Refine logotypes • Final color • Refined uniforms • Prelim uni sample (helmet) • Present to Raven Logo Team	May 17 in Baltimore (ABM must be present – final decision on team colors, primary logo, and basic uni design necessary)

May 20 to June 7	• Final uniforms (paper) • Refined uni samples (helmet, jersey, pants) • Final primary and secondary logos • Final logotype • Final Presentation to RLT	June 7 in Baltimore

• I pressed hard for any time saving options and was told that this was almost as tight as the process can get to get it done correctly. We may save a week or two by really loving some of the preliminary stuff and making early final decisions. Even then the time saving is at best minimal.

Raven Logo Team:

I would like to impanel a Raven Logo Team who will be our internal working/discussion group on this matter. All members agreeing to sit on this panel must be in attendance at all presentations no matter what - participation must be consistent to make sure are staying on the same page.

In addition to several staff members, I would like to ask two community members to participate so that we are making sure to get a fresh external view. I suggest the following for the task:

- Me
- David Cope
- Kevin Byrne
- Eddie Carroll
- Bob Leffler (Ad Agency of Record)
- Sandy Hillman (Partner at Trahan, Burden & Charles)

Name Game Update

Challenges to Name:

In speaking with Gary Gertzog of NFL Properties, several challenges to the ownership of the name have already arisen. In order of importance they are: The New Haven Ravens, The local wheelchair basketball team Ravens, some 'designer' who has laid some nib-nabby claim to the name.

- Just as we expected them to, the New Haven Ravens sent a letter asking us to recognize the immense national goodwill they have created for the name and thus we should consider not using the name. Gary sent a response telling them that teams with same names have existed simultaneously in two or more major or minor leagues for eons, and on that basis to forget it. Properties is awaiting the reaction of the NH Ravens' council and is prepared to jump jurisdiction and file something in Baltimore prior to a possible filing by the NH'ers in CT.

- The wheelchair crowd is far more problematic from a PR standpoint than from a strict legal standpoint. The council for the wheelchair hoopsters demanded $30K a year for ten years which obviously was rejected out of hand with the promise of doing something reasonable. I suggest we basically "adopt" this group, buy uniforms for them (get Starter to donate) and give 'em a few bucks every year. We could do them a good service and also utilize them in community relations kinds of ways.

- The rest are nib-nabbers that do not merit comment.

PR statements re: name challenges:

We must be very circumspect in our public commentary with regard to challenges to our use of "Ravens". The last thing we want to do is give some elected judge a good excuse to rule in favor of the little guy versus the big guy.

So, I strongly urge, and Gary Gertzog agrees that we all basically say the same thing if faced with a question re: any possible suits or challenges. The party line he can live with is:

"Names have been shared simultaneously between teams in different leagues throughout this century. In fact five NFL teams currently share names with teams in other sports. Sports fans seem to be knowledgeable enough to distinguish an NFL team in Baltimore from a minor-league baseball team in New Haven".

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

FREDERICK E. BOUCHAT,	*
Plaintiff	*
v.	*
BALTIMORE RAVENS, INC., et al.	*
Defendants	*

CIVIL ACTION NO.: MJG-97-1470

AFFIDAVIT OF EDWIN GOLD
[Filed July 23, 2001]

1. My name is Edwin Gold. My business address is the University of Baltimore, Yale Gordon College of Liberal Arts, School of Communications Design, Division of Language, Literature and Communications Design, 1420 N. Charles Street, Baltimore, Maryland 21201-5779, where I am employed as a full professor in the School of Communications Design. I am over 21 years of age. I am competent to testify and have personal knowledge of the matters set forth herein.

2. From December 1956 to April 1991, I worked at the Barton-Gillet Company in Baltimore, Maryland. For most of those years, I served as the company's Executive Vice President and Creative Director. During my time there, Barton-Gillet emerged as the pre-eminent firm in the area of branding and institutional marketing. Along with my associates, I designed, art-directed and produced hundreds of award-winning publications and identity campaigns for such

universities and colleges as Bennington, Brandeis, Colgate, Columbia, Cornell, Duke, Harvard, Northeastern, NYU, Princeton, Sarah Lawrence, Smith, Yale and Yeshiva.

3. Along with my work for these institutions, I was also responsible for the design and art direction of materials for such non-profit organizations as the Metropolitan Opera and Lincoln Center. Locally, I have designed many communications materials and identity programs for such companies and institutions as The *Sunpapers*, The First National Bank of Maryland, Maryland National Bank, The Rouse Company, Johns Hopkins Hospital, The Baltimore Museum of Art, Goucher College, and The University of Maryland System.

4. I am listed in both "Who's Who in Advertising" and "Who's Who in the World". Over the course of my career I have received more than 400 design awards from such organizations and publications as the New York Art Director's Club, The American Institute of Graphic Arts, The Type Director's Club of New York, The Addy Awards, The One Show, The Advertising Club of New York, The Society of Illustrators, The University and College Design Association, The Art Director's Club of Metropolitan Washington, The Baltimore Art Director's Club, The Society of Typographic Artists, The Desi Awards, The Andy Awards, The Mead Library of Ideas, *Communication Arts Magazine, Print Magazine, Graphis Magazine, Magazine Design and Production Magazine*, and *Financial World Magazine*. In 1995 an identity program I had designed for a local physical therapy company was included in a book *"The Best American Corporate Identity"*.

5. In 1991, I left Barton-Gillet to take a position as Professor in the Yale Gordon College of Liberal Arts at the University of Baltimore. Since coming to the University, I have been teaching courses almost exclusively in the University's Publications Design graduate and doctoral programs. I currently teach courses in "Branding", "The Design/Business Link", "Creative Concepts" and the program's capstone course, "Seminar in Publications Design".

6. I am the author of three books, "*Covers, covers, covers*" (CASE), "*The Business of Graphic Design*" (Watson-Guptill, 1985), and "*The New Business of Graphic Design*" (Watson-Guptill, 1996). The latter was named by "*Critique*" magazine as one of the 82 greatest books on design ever written.

7. I am a frequent lecturer to professional design and communication groups, have served on many design juries and have written numerous articles on corporate identity, design and the design profession. These articles have appeared in such national and international design publications as *Business, Step-By-Step Graphics Magazine*, the *AIGA Journal, CASE Currents, Communication Arts Magazine* and *Critique* magazine.

8. I am a Past-President of the Maryland Institute, College of Art Alumni Association and the Baltimore Chapter of the American Institute of Graphic Arts (AIGA). I presently serve as the UB student liaison for the AIGA.

9. Based on the foregoing, I have particularized knowledge and expertise concerning identity campaigns and programs and the manner, method and purposes of the use of logos, identity

campaigns, and identity programs. I am also familiar with standard professional and industry standards and practices concerning identity campaigns and programs and the manner, method and purposes of the use of logos, identity campaigns, and identity programs.

10. The discipline of corporate or institutional identity is a subset of branding, which in turn is a subset of marketing. Branding is a combination of design, messages, environment, symbols, and orchestrated behavior, all focused on one goal: to bind a customer to a company. The purpose of branding is to create in an audience's mind certain specific and positive perceptions of the company or institution. For hundreds, perhaps thousands of years, individuals, craftsmen, and organizations strove to identify and distinguish themselves from others. Whether they did this with dress, makeup, hairstyle, markings, or a Amark@, the common element all these signs shared was that, for the most part, the distinguishing features were primarily visual, which was understandable considering that people tend to take in visual messages much more quickly than verbal or written messages. Furthermore, visual signals reach across language barriers and can be understood by all people, regardless of what language they speak.

11. Corporate identity is the visual manifestation of branding and consists of the logo, the logotype and the corporate colors. A well-designed logo should serve as a visual personification of a company or institution. A logo is a reminder of goodwill (or in some cases, bad will); and, to the extent that the logo design itself invokes positive responses, it creates business goodwill. This identity is then applied to packaging and signage, environmental structures, stationery, interiors, transportation and uniforms as part of the corporate

identity program. The objective of a well-designed logo is to become a kind of visual shorthand that will stand for what the company wants the public to know and feel about the company. Indeed, there is an entire industry devoted to the design of corporate identities and corporate identity programs. These are design firms that specialize and do almost nothing other than corporate identity programs.

12. As early as the turn of the last century, corporations in Europe were already creating individual logos in an attempt to quickly identify themselves to their audiences. Companies like A.E.G. (Allgemeine Eliktrizitats-Gesellschaft) were creating excellent logos that were intended to quickly communicate to a multitude of people in different European countries not only who they were, but also what they stood for. In the 1930's, the great European designers fled from Hitler to immigrate to the United States, bringing with them a new and completely modern approach to corporate identity. American companies quickly learned that a well-designed logo used within the overall context of "Corporate Identity Programs" and visually communicating all the qualities that a corporation wished its audiences to associate with the company, was one of their most powerful marketing tools. Designers such as Paul Rand (IBM), William Golden (CBS Eye), Herb Lubalin (Leggs), and Milton Glaser (I ♥ NY), for example, designed logos that could stand above and apart from the competition, regardless of whether there were or were not words to accompany and explain the logos. Other examples of well-known logos developed over the years are Nike, Shell, VW, Mercedes and McDonald's.

13. Corporate identity designers, as a matter of course and practice within their profession, work very hard with their clients to identify the messages that their clients want to communicate. They then try to translate this message into effective visual cues and symbols. To develop these identity programs and reinforce their overall branding strategies, companies expend substantial dollar amounts on promotions, packaging, advertising and positive customer experiences. In creating a logo, corporate identity designers, as a matter of course and practice within their profession, utilize design elements that are deliberately constructed to communicate the individual personality and qualities of a corporation or institution. It is an established and universal principle of identity creation and design that every company or organization must communicate its identity as fast and as clearly as possible, and that a logo, rather than being a mere interchangeable and irrelevant graphic decoration, is the single most important and valuable marketing tool a company has to link itself to the associations it has worked so hard to build.

14. While a logo is only part of the total branding process, because a well-designed logo is visual shorthand for the corporation, corporate identity designers, as a matter of course and practice within their profession, design a logo with the intent to communicate those qualities that the client would like the public to associate with the corporation or institution. If, for example, an insurance company wanted to communicate stability and tradition, it would use the Rock of Gibraltar (Prudential). If it were a sporting goods manufacturer, like Nike, it might want to communicate action by using an abstract "swoosh". In this instance, the NFLP and the Ravens, as reflected in the statement of David Modell on

NFL.com (NFLP #547) and Bruce Burke, in a June 6, 1996 article in *The Sun*, by Jon Morgan, stated that they wanted a logo that would be unique to Baltimore and that would communicate a long term commitment and association with the City and Maryland while distancing itself from the many other bird symbols in other logos.

15. It is an established and universal principle of identity creation and design that the ultimate purpose of a corporate identity program is to sell more products and services. Companies throughout industry and commerce expend substantial resources in the design of logos that communicate the essential qualities of the companies, after which they expend substantial resources to place their logos on everything possible, as part of their corporate identity programs. In other words, they try to create a shorthand connection between the potential customer and the company, so that they can eventually translate this "branding" effort into revenues for the company. The repetitive use and public exposure of a logo is a marketing tool and is intended to produce revenue. It is used on advertising and direct marketing, such as direct mailings of sales solicitation materials for the purposes of short-term results in the immediate sales of products and services. The logo is also used for long term marketing goals by repetitive use and display wherever possible to build long term associations and relationships, for the eventual purpose of producing future sales and revenues. This long-term strategy might include the placing of the logo on such materials as billboards, flags, stationery, business cards, informational brochures and tickets. It is an established and universal principle of identity creation and use that there is a direct correlation between the degree of exposure that a company gives its logos in these marketing activities and

the revenues that it obtains. As a matter of course and practice, businesses use identity campaigns to maintain and increase the sale of their products and services.

16. I have reviewed the originals of various literature and other documents that I understand were distributed by the Baltimore Ravens. A list of these materials is attached hereto.

17. I have also reviewed the statement of David Modell on NFL.com (NFLP #547) and a June 6, 1996 article in *The Sun*, by Jon Morgan, copies of which are attached hereto. I also reviewed photographs of the various uses to which the Baltimore Ravens put the logo to use. Photocopies are also attached. Based on the foregoing enumerated materials, I am able to state to a reasonable degree of professional certainty that the Ravens intended to and did, in fact, conduct a corporate identity campaign for the purpose of marketing and promoting the team both in the short and long term, with the purpose and expectation of increasing the sale of its own services and products, including the sale of and, additionally, for the purpose of enhancing the identifying value of the logo to sponsors, manufacturers and TV stations. In particular, I base this conclusion on the repetitive use of the logo in every piece of literature I examined. In at least one instance, it appeared some 17 times in a document of only 20 pages (12th Man Playbook). The logo, usually with no other supporting words, can be seen within and around the stadium. It is placed on uniforms, flags, trucks, banners, and soft drink containers, among other uses. It appears on TV, in ads, and on stationery. It almost always appears when a television reporter mentions the team. Without the logo, there would be no immediate connection with the team and with the NFL experience. In short, to a reasonable degree of

professional certainty, to the extent it is not axiomatic, the Baltimore Ravens used the logo in question and the messages imbedded within that logo as part of its overall marketing and business development efforts in order to sell tickets, PSL's, concessions, merchandise, sponsorships and the like. It is the stated position of the Ravens and the NFLP that "a logo's primary and almost entire, appeal to the public lies in its ability to permit a third party - whether a football fan, a sponsor, or a broadcast network - to associate itself with the tremendous fame and goodwill of NFL football." This assertion is absolutely true and describes the very valuable role that logos play in the NFL's overall branding process: the logo is the primary tool used to build an association with and connect a third party to a particular NFL football team, because there is almost no other practical and efficient way to create and communicate this association to third parties or for a third party to even recognize this association without the display and dissemination of a logo. The NFL and the Ravens, as evidenced by the materials referenced above, like thousands of other organizations, are very aware of the importance of branding and spend substantial dollars on their identity campaigns, not only by creating an incredibly exciting sporting experience, but by trying, in every way possible, to remind their fans of this experience, to mark this experience, and have fans and potential fans identify with the sport and the particular teams. The logos are, therefore, invaluable, because their use is so important as tools of communication in generating revenues.

I hereby affirm under the penalty of perjury that the foregoing is true and correct.

/s/ EDWIN GOLD

Index - Attachments to Edwin Gold's Affidavit

David Modell's Statement (NFLP 547)

Sun Article dated June 6, 1996

Tickets for Games: P2, 2, 3, 7, Countdown 4

Ticket for Final Game

Miscellaneous "various use" photographs

File folder - Ravens 98:

Ravens 12th Man Playbook, a Guide to Your New Stadium

Seat License Agreement (Mark Reynolds - 12/2/98)

1998 Baltimore Ravens Schedule

Ravens' Report, Third Quarter '98 (Magazine)

The Fan's Stadium, Official 1998 Inaugural Season Stadium Merchandise (Magazine)

The Ravens at Camden Yards, A Winning Game Plan for Getting There. (Brochure by MTA for Inaugural Season Pass)

Sheraton Inner Harbor Hotel, Welcomes Raven Fans (brochure for package deals)

Major League Vacations - Official Baltimore Ravens Road-Trips, Volume VII, Issue 1, Fall -98 (brochure)

Provident Bank of Maryland Flyer

Ravenszone.net, In Print, Winter 1999 (Magazine)

July 10, 1998 letter to PSL Holder from Baltimore Ravens' Director, Ticket Operations

Envelope to Mark Reynolds from Baltimore Ravens stamped as being received July 14, 1998

Ravens' Report, First Quarter '99, Special Edition (2 copies of this Magazine)

File Folder-Ravens:

Baltimore Ravens' Club Level Seating brochure

Baltimore Ravens 1996 A Fan's Guide to Memorial Stadium, Our Inaugural Season brochure

Baltimore Ravens Ticket Invoice (Due date: January 21, 1999, Mark Reynolds)

Fax from Bernie Stawski, Baltimore Ravens, to Mark Reynolds dated November 12, 1998 (3 pages)

Baltimore Ravens Personalized Seating Diagram for Laurie Reynolds

Seating Diagram (general)

Envelope from Baltimore Ravens, Parking Information Enclosed, with a letter to Jean Reynolds dated June 22, 1998 & brochure - What's Your Game Plan?

Baltimore Ravens Envelope

Fax from Bernie Stawski, Baltimore Ravens, to Mark Reynolds dated May 28, 1998 (says 5 pages, but it's only 3 pages)

Letter to Mark Reynolds dated May 20, 1998 from Roy Sommerhof, Director of Ticket Operations

Business card attached to: Letter to Mark Reynolds dated 6/30/98 from Stawski, Baltimore Ravens; Budweiser Hospitality Village information on Ravens' letterhead, Budweiser Hospitality Village Menus on Ravens' letterhead, brochure: A New Way to Party on Game Day!

Baltimore Ravens Personalized Seating Diagram for Kristy Reynolds

Baltimore Ravens Personalized Seating Diagram for Laurie Reynolds

Baltimore Ravens Personalized Seating Diagram for Jean Reynolds

Baltimore Ravens Ticket Invoice (Due date: 6/1/98, Mark)

Permanent Seat License Application (brochure)

Baltimore Ravens Ticket Invoice (Due date: 4/15/98, Mark)

Baltimore Ravens' envelope with letter to Mark Reynolds dated March 27, 1998 from Roy Sommerhof

Baltimore Ravens Ticket Invoice (Due date: 3/16/98) with attached envelope and letter to Mark Reynolds dated January 23, 1998 from Roy Sommerhof

Ravens' Report, Winter '98

Letter to Mr. Reynolds dated 11/3/97 from Roy Sommerhof

Letter to Mr. Reynolds dated 10/27/97 from The Baltimore Ravens Ticket Office

Baltimore Ravens Football at Camden Yards (newspaper on new stadium - 2 copies)

Letter from Roy Sommerhof to Ravens Fan (undated)

Ravens' Report, Volume 4

Major League Vacations, Official Baltimore Ravens Road-Trips, Fall '97 (brochure)

Flyer: The Baltimore Ravens in conjunction with US Soccer Present...Tune Up for the World Cup!!!

1997 MTA Park-And-Ride Bus Service to Baltimore Ravens Football at Memorial Stadium brochure

Letter dated August 5, 1997 from The Baltimore Ravens Ticket Office to: Dear Season Ticket Holder with attached ticket

Fan Guide, The Official Guide to Historic Memorial Stadium, Baltimore Ravens 1997 Season

Letter dated May 26, 1997 from Sommerhof to Reynolds

Baltimore Ravens' envelope, received June 2, 1997

Flyer from Baltimore Ravens: Refer a Friend!

Permanent Seat License Assignment & 1997 Season Ticket Renewal

Letter dated 2/1/97 to Mark Reynolds from Roy Sommerhof

Baltimore Ravens' envelope, received 9/6/96

Letter dated 11/18/96 to Mark from Roy Sommerhof

Letter dated 7/5/96 from Sommerhof To All New Ravens Season Ticket Holders

Ticket

Baltimore Ravens' large envelope

Letter dated 11/22/96 from Art Modell to Mark Reynolds

Extra Order Application (PSL/Tickets)
Ravens Season Ticket Seat Confirmation for Reynolds

1996 MTA Park-And-Ride Bus Service to Memorial Stadium for Ravens Football (brochure)

Seating Chart

Letter dated 9/3/96 from Art Modell to Reynolds

Letter dated 7/22/96 to Season Ticket Holder from Ravens' organization members

Baltimore Ravens' envelope, received July 14, 1997

Letter to Reynolds from David Modell, with enclosed Map of Tailgate Zone and Ravens' Tailgate Zone Application form

Ravens' Report, Volume 2

Business card of Joseph Hickey

Large Baltimore Ravens' Envelope - Inside is: Preview, the Official Magazine of the Baltimore Ravens Presented in Partnership with the Baltimore Sun; The Baltimore Ravens Suites; Ravens' Report, Volume 4; letter dated 11/12/97 to Mark Reynolds from Joseph Hickey

Ravens' Report, Volume 3

Letter from Baltimore Ravens Ticket Office to Ravens PSL Holder (undated)

Letter dated 5/8/98 from Roy Sommerhof to Laurie Reynolds

Letter dated 6/5/98 from Sommerhof to Mark Reynolds with envelope

Christmas card from the Ravens

Baltimore Ravens' envelope, received 6/25/98, with 6/22/98 letter to Laurie from Sommerhof with parking lot information

Baltimore Ravens' envelope, received 7/8/98 with enclosed letter to Mark Reynolds dated 7/6/98 from Sommerhof

Baltimore Ravens' envelope, received 6/24/98, with 6/22/98 letter to Mark from Sommerhof with parking lot information

Enjoy Your Home Field Advantage (Magazine)

Date: June 6, 1996 Section: SPORTS
Edition: FINAL Page: 6D
Word Count: 846
Author: Jon Morgan SUN STAFF
Index Terms: FOOTBALL
Text:

When you see the Ravens take the field in their new uniforms, the NFL wants you to think of two things: Baltimore and football.

In that order.

The designs unveiled yesterday feature several local touches, from bits of the Maryland flag to a giant "B" at the center of the primary logo. The only thing missing is a "From Mayor Kurt L. Schmoke and the Citizens of Baltimore" stencil on each helmet.

This is a team, after all, hemmed in by competitors to the north and south, and playing in a city intimately aware of how fragile the connection is between a team and its zip code.

"We wanted something that was unique to the city," said Bruce Burke, vice president of advertising and creative director of NFL Properties.

There is precedent for this in the league, but not recently: the Green Bay Packers, Kansas City Chiefs, Chicago Bears, San Francisco 49ers, Miami Dolphins and Denver Broncos have the hometown's initials on the helmets. But an initial and flag is a first for the league.

"The goal of the logo is to capture the spirit of the Ravens as a powerful bird and, at the same time, have an identity with the city of Baltimore and state of Maryland," Ravens owner Art Modell said in a written statement.

Burke, whose office coordinated the two-month creation process for the Ravens' look, said the municipal emphasis, though not used in any recent redesigns, may grow more common as the NFL wrestles with fan reaction to franchise relocations.

Focus groups held in Baltimore also showed considerable interest in such symbolism, he said. For example, the shield with the "B" on it was vastly preferred over a version with an "R."

There was also a push from within the team to identify itself closely with the city, both as a contrast to the Orioles -- a franchise with many Washington fans and no city on its uniform -- and to appeal to local passions, according to sources involved in the effort.

Redskins owner Jack Kent Cooke also favored the idea, Burke said.

"Jack Kent Cooke made it clear to us that this team was close to his and he wanted a mark that was unique to Baltimore," he said.

Burke said the colors came first, shortly after the name was picked. Sports leagues often employ color trend forecasts, but that wasn't necessary this time.

"With a name like the Ravens, you look at the bird and there is black with some purple. That was a no-brainer," Burke said.

Ravens are jet black with a purple and green iridescence to their feathers.

From there, the league went to work on a logo. Burke said he sought to avoid putting too much emphasis on the bird because of the widespread avian influence in the NFL. Four teams have birds on their helmets: the Falcons, Seahawks, Cardinals and Eagles.

"We worked with a bird symbol, and the more we looked at it, we realized that it wasn't unique and wouldn't be enduring," he said. "Birds have been done."

A crest or shield, however, was only being used by the Raiders. And it harkens to the heraldry in Maryland's colonial history, something the NFL's research discovered was popular among potential fans here, he said.

A similarly shaped shield was also the basis of the logo selected for Baltimore during its failed expansion bid in 1993. That team would have been called the Bombers, and its shield had the silhouette of a Baltimore-made warplane and bursts of sun rays.

The Ravens' shield comes in several variations. All have the "cross bottony" stylized cross found on the 17th century seal of George Calvert, the first Lord Baltimore and founder of the Maryland colony.

Centuries ago, families were permitted by the pope to top their flags with the cross if they had fought in the Crusades, a series of ecclesiastic conquests of Jerusalem in the Middle Ages. The cross was part of the crest of the Crosslands, Calvert's maternal relatives.

Ravens players will wear a small shield on the front pocket area of their pants that is partitioned into quarters occupied by a "B," an "R," the Calvert crosshatch, and the Crossland bottony. A shield with the letter "B" will appear on both sides of the helmets.

"It is becoming increasingly difficult to design a uniform in the NFL. We wanted a look that is timeless and will endure," Burke said.

Because of the time it takes to manufacture uniforms, players will continue to wear generic white uniforms in practice and the preseason. The black and purple duds will debut with the regular-season home opener Sept. 1, Burke said.

Ravens-related merchandise will begin hitting store shelves today.
Caption:
ILLUSTRATION

Caption: The look: Logos using a bird aren't unique -- four other NFL teams have them -- but incorporating the state flag (upper left) is one of a kind.

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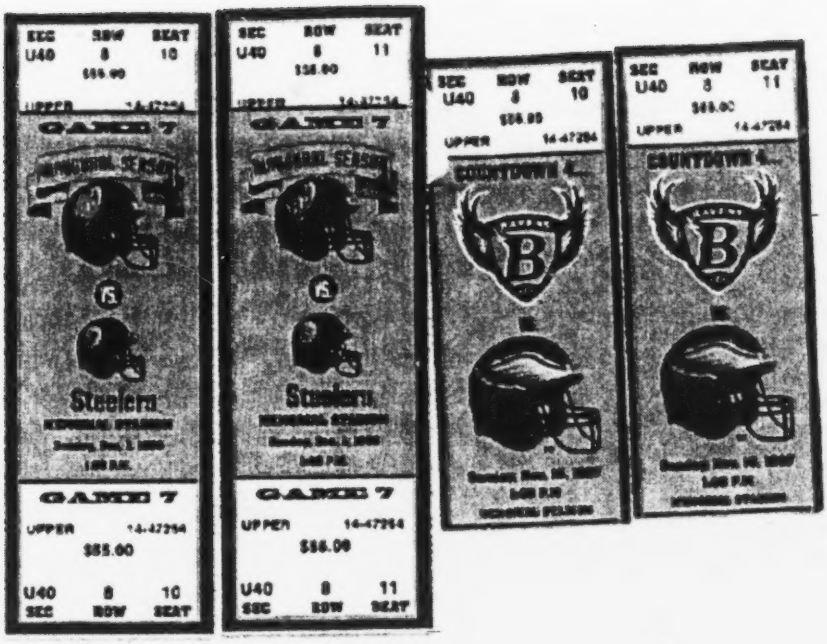
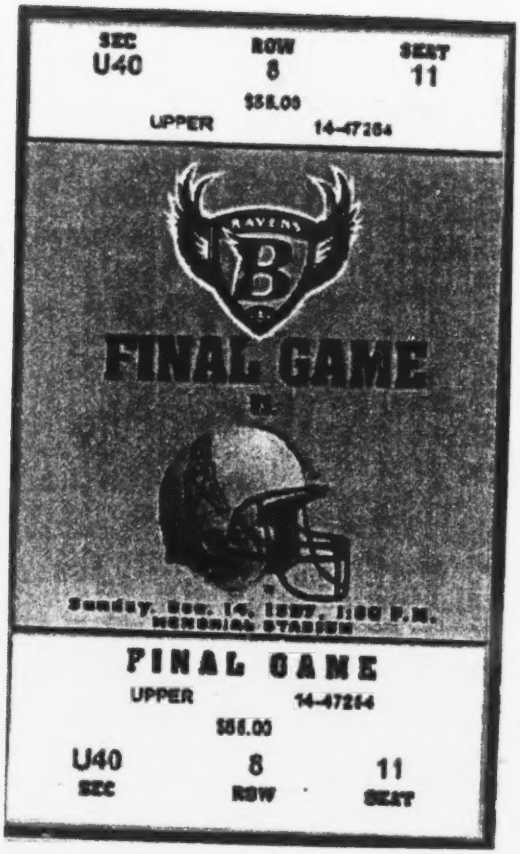
Headline: Ravens logo descends on Baltimore

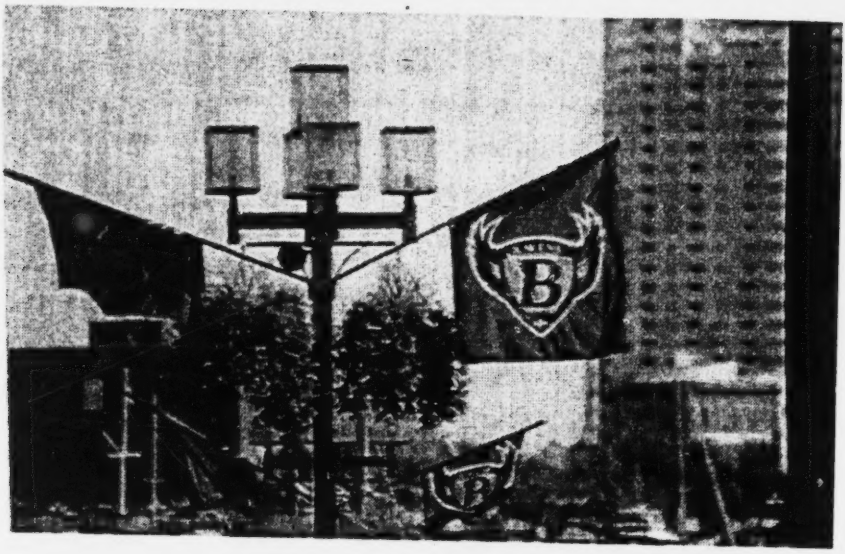

SEC ROW SEAT
U40 8 10
$55.00
UPPER 14-47264
GAME 7
VS
Steelers
GAME 7
UPPER 14-47264
$55.00
U40 8 10
SEC ROW SEAT
SEC ROW SEAT
U40 8 11
$55.00
UPPER 14-47264
GAME 7
VS
Steelers
GAME 7
UPPER 14-47264
$55.00
U40 8 11
SEC ROW SEAT
SEC ROW SEAT
U40 8 10
$55.00
UPPER 14-47264
COUNTDOWN
VS
SEC ROW SEAT
U40 8 11
$55.00
UPPER 14-47264
COUNTDOWN
VS

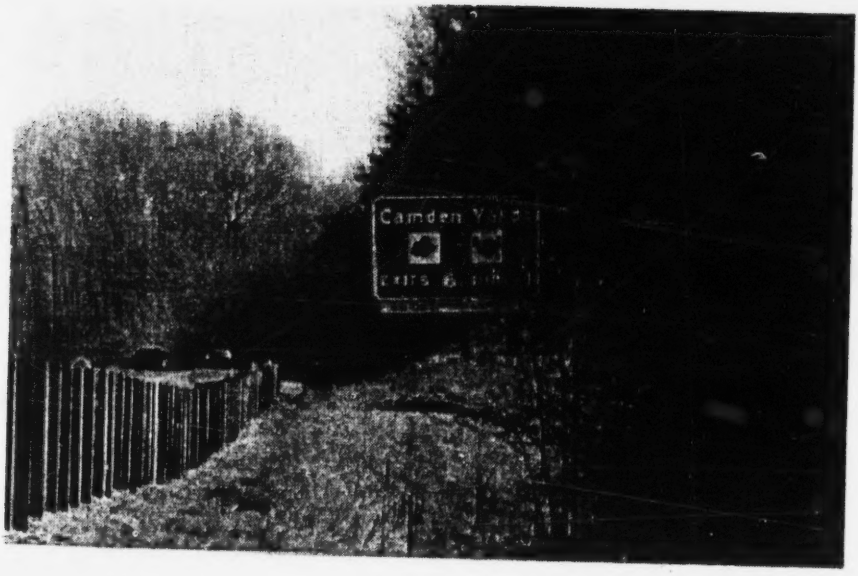
SEC ROW SEAT
U40 8 10
$55.00
VS
PACKERS
SEC ROW SEAT
U40 8 11
$55.00
VS
SAINTS
SEC ROW SEAT
U40 8 11
$55.00
VS
Pirates

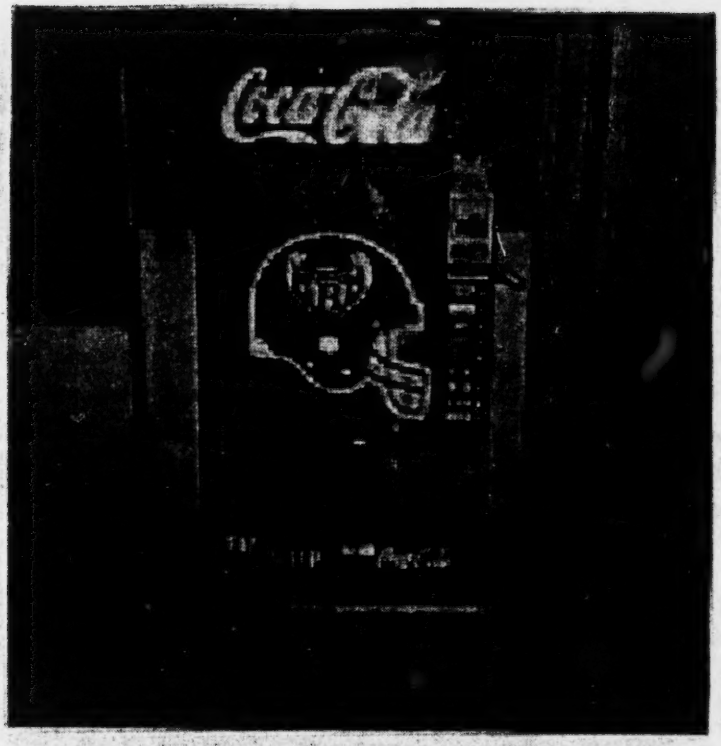

SEC
U40
ROW
8
SEAT
11
$55.00
UPPER
14-47264
RAVENS
B
FINAL GAME
Sunday, Dec. 14, 1997, 1:00 P.M.
MEMORIAL STADIUM
FINAL GAME
UPPER
14-47264
$55.00
U40
SEC
8
ROW
11
SEAT

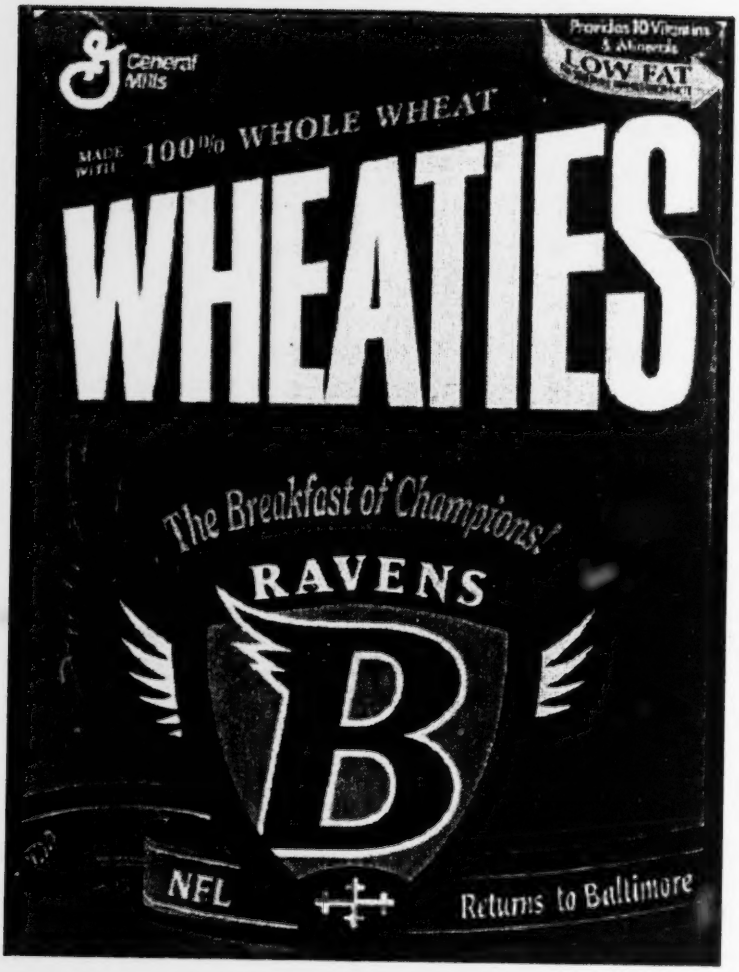
Orioles
RAVENS
PARKING

RAVENS
RAVENS RADIO
WLIF
102


B




Coca-Cola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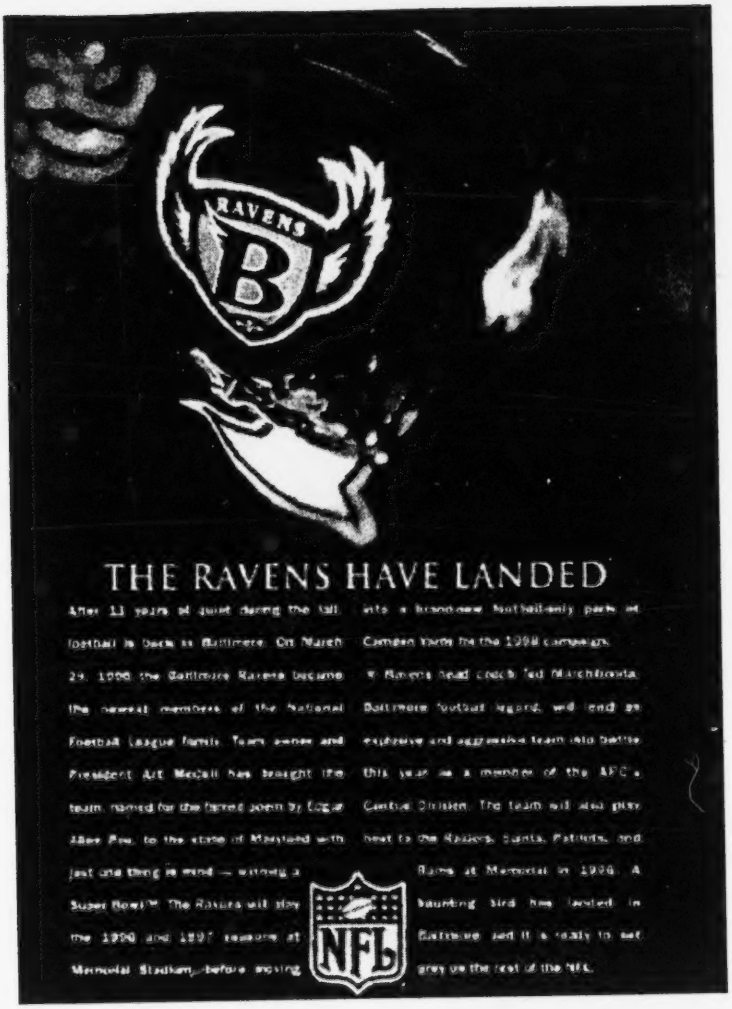
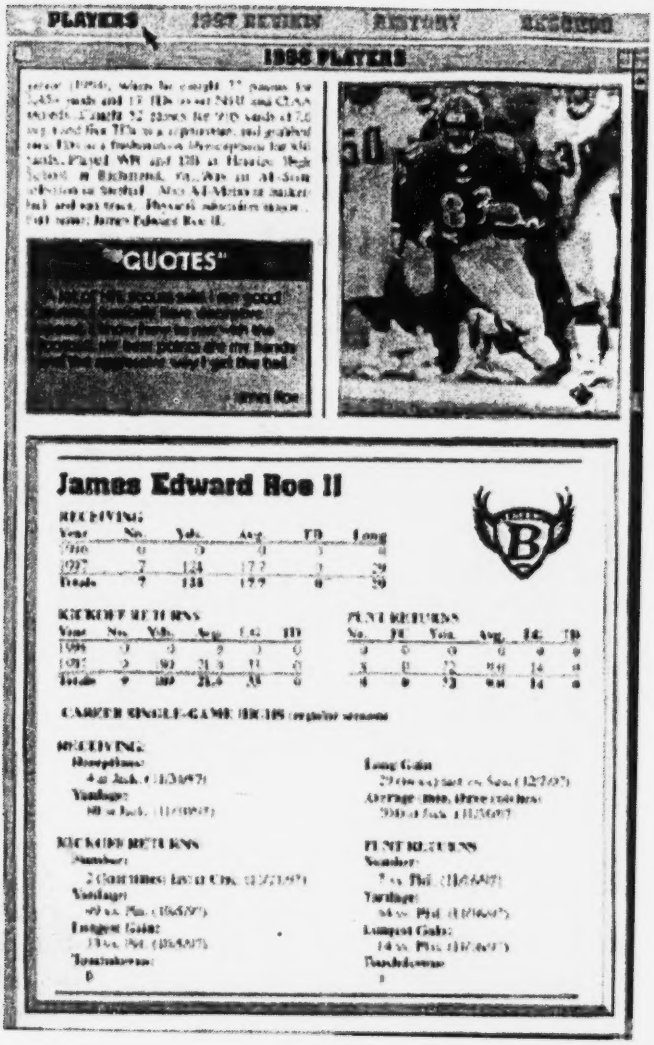
LOW FAT
MADE WITH 100% WHOLE WHEAT
WHEATIES
The Breakfast of Champions!
RAVENS
B
NFL
Returns to Baltimore



THE RAVENS HAVE LANDED

After 11 years of quiet during the fall football is back in Baltimore. On March 29, 1996 the Baltimore Ravens became the newest members of the National Football League family. Team owner and President Art Modell has brought the team named for the famed poem by Edgar Allen Poe, to the state of Maryland with just one thing in mind — winning a Super Bowl™. The Ravens will play the 1996 and 1997 seasons at Memorial Stadium, before moving into a brand-new multi-million dollar park at Camden Yards for the 1998 campaign.

Ravens head coach Ted Marchibroda, Baltimore football legend, will lead an explosive and aggressive team into battle this year as a member of the AFC's Central Division. The team will also play host to the Raiders, Giants, Patriots, and Rams at Memorial in 1996. A haunting bird has landed in Baltimore and it's ready to set prey on the rest of the NFL.



PLAYERS 1997 REVIEW HISTORY RECORDS

1998 PLAYERS

"QUOTES"

James Edward Roe II

RECEIVING:

Year	No.	Yds.	Avg.	TD	Long
1996	0	0	0	0	0
1997	7	124	17.7	1	29
Totals	7	124	17.7	1	29

KICKOFF RETURNS

Year	No.	Yds.	Avg.	Lg.	TD
1996	3	0	0	0	0
1997	2	89	31.5	51	0
Totals	5	89	31.5	51	0

PUNT RETURNS

No.	Fc	Yds.	Avg.	Lg.	TD
0	0	0	0	0	0
5	0	55	11.0	14	0
5	0	55	11.0	14	0

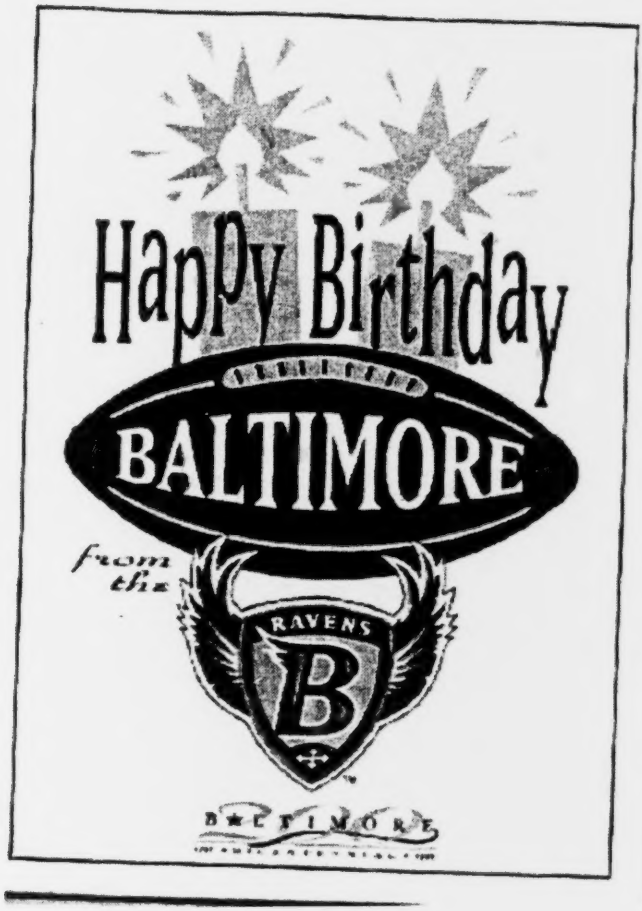
CAREER SINGLE-GAME HIGHS (regular season)

RECEIVING:
Receptions:
4 at Jack. (11/30/97)
Yardage:
88 at Jack. (11/30/97)
Long Gain:
29 (twice) last vs Sea. (12/7/97)
Average (min. three catches):
20.0 at Jack. (11/30/97)

KICKOFF RETURNS
Number:
2 (four times) last vs Chi. (12/21/97)
Yardage:
89 vs. Pitt. (10/5/97)
Longest Gain:
51 vs. Pitt. (10/5/97)
Touchdowns:
0

PUNT RETURNS
Number:
5 vs. Pitt. (10/5/97)
Yardage:
55 vs. Pitt. (10/5/97)
Longest Gain:
14 vs. Pitt. (10/5/97)
Touchdowns:
0

BEST AVAILABLE COPY


Happy Birthday
BALTIMORE
from the
RAVENS
B
BALTIMORE

THE FAN'S STADIUM
Stocking Stuffers
RAVENS
RAVEN
BALTIMORE

Charge In '98 With The Ravens And MBNA!

Request Yours Today!

1-800-NFL-9929

Mention priority code HLH6

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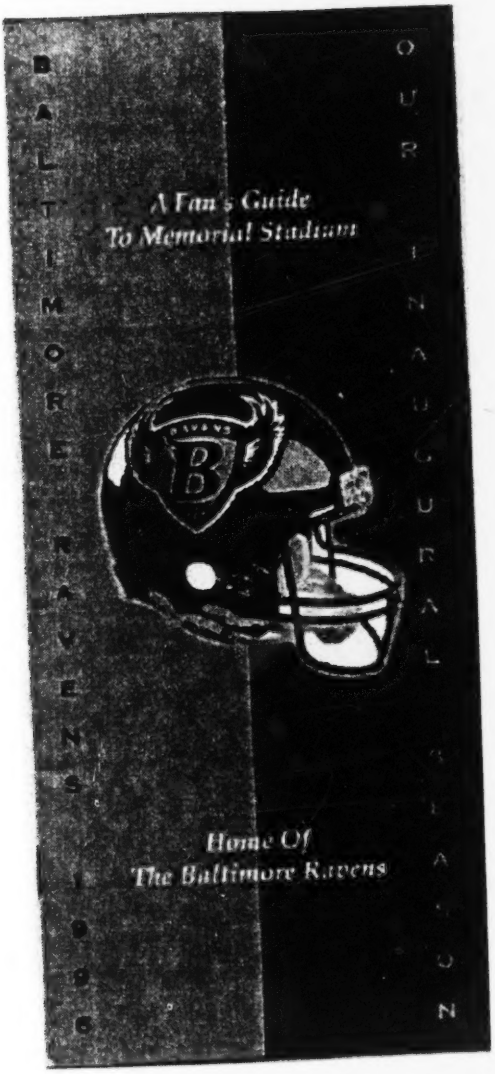

BALTIMORE RAVENS 1996
A Fan's Guide
To Memorial Stadium
OUR INAUGURAL SEASON
Home Of
The Baltimore Ravens

DIRECTORY

RAVENS EXECUTIVE OFFICES
Baltimore Ravens, Inc.
2000 St. Paul Place
Suite 2400
Baltimore, Maryland 21202
Offices: (410) 547-8100
(410) 547-8112 (fax)
Ticket Information: 1-888-9-RAVENS
1-888-972-8367
To charge tickets by phone call:
TicketMaster - (410) 481-SEAT
(Baltimore)
(202) 432-SEAT
(Washington)

RAVENS TRAINING FACILITY
Baltimore Ravens, Inc.
11001 Owings Mills Boulevard
Owings Mills, Maryland 21117
Office: (410) 654-6200
(410) 654-6212 (fax)

STADIUM MANAGEMENT
Maryland Stadium Authority
Memorial Stadium
1000 E. 33rd Street
Baltimore, Maryland 21218
Office: (410) 662-4458
(410) 662-0340 (fax)

Maryland Stadium Authority
Executive Offices
333 W. Camden Street
Suite 500
Baltimore, Maryland 21201
Offices: (410) 333-1560
(410) 333-1888 (fax)

STADIUM CONCESSIONAIRE
ServiceAmerica Corporation
Memorial Stadium
1000 E. 33rd Street
Baltimore, Maryland 21218
Office: (410) 366-9330

TICKET INFORMATION

Approximately 6,000 single game tickets are available for each game through the Ravens Ticket Office or TicketMaster. Fans can purchase tickets by calling TicketMaster phone charge or by visiting a TicketMaster outlet. The Ravens carpool their season ticket sales at 547-8100.

Hours of operation for the Ravens Ticket Office at Memorial Stadium are 10:00 AM until 1:00 PM on game Sundays and 3 hours before game time on Saturday evening games.

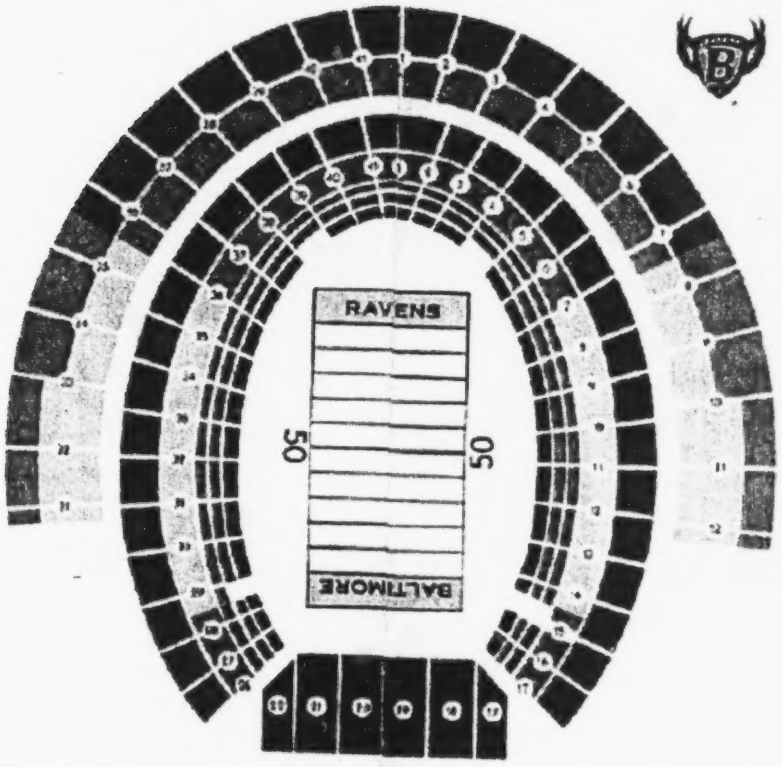
Will Call windows are located next to Gate W2 and are open 2 hours before kickoff.

Phone number for ticket information
Ravens - 1-888-9-RAVENS

To charge tickets by phone call:
TicketMaster - (410) 481-SEAT
(Baltimore)
(202) 432-SEAT
(Washington)

TicketMaster outlets are located in all Hecht's stores as well as other locations throughout Maryland, D.C., Pennsylvania and Virginia.

MEMORIAL STADIUM
HOME OF THE BALTIMORE RAVENS



BALTIMORE RAVENS

Bernie Stawski
Sales Associate

200 St. Paul Place, Suite 2400 — Baltimore, Maryland 21202
ph: 410.960.5262 — fax: 410.468.1650

BALTIMORE RAVENS
200 St. Paul Place
Suite 2400
Baltimore, MD 21202

June 30, 1998

Dear

Thank you for your interest in the Baltimore Ravens, enclosed is the information on our Budweiser Hospitality Village. This is a great opportunity to entertain clients as well as take care of respected employees. If you have any questions please feel free to call me any time.

Sincerely

Bernie Stawski
Sales Associate

BALTIMORE RAVENS
200 St. Paul Place
Suite 2400
Baltimore, MD 21202

BUDWEISER HOSPITALITY VILLAGE MENUS

MENU ONE

Grilled Stadium Hot Dog On Bakery Fresh Bun
With Ketchup, Mustard Relish And Onion
Grilled Hamburger On A Kaiser Roll
With Lettuce, Tomato, Kosher Pickles, Onions,
Ketchup, Mustard Relish Chips
Draft Beer And Soft Drinks

MENU TWO

Grilled Hamburger On A Kaiser Roll
With Lettuce, Tomato, Kosher Pickles, Onions,
Ketchup, Mustard Relish Chips
Italian Sausage With Peppers And Onions
Grilled Chicken Breast Sandwich
With Lettuce, Tomato And Kosher Pickles On A Kaiser Roll
Baked Beans
Potato Salad
Chips
Draft Beer And Soft Drinks

MENU THREE

BBQ Ribs
Pulled Pork Or Pit Beef
With Lettuce, Tomato And Kosher Pickles On A
Bakery Fresh Roll
Baked Beans
Cole Slaw
Corn On The Cob
Chips
Draft Beer And Soft Drinks

MENU FOUR

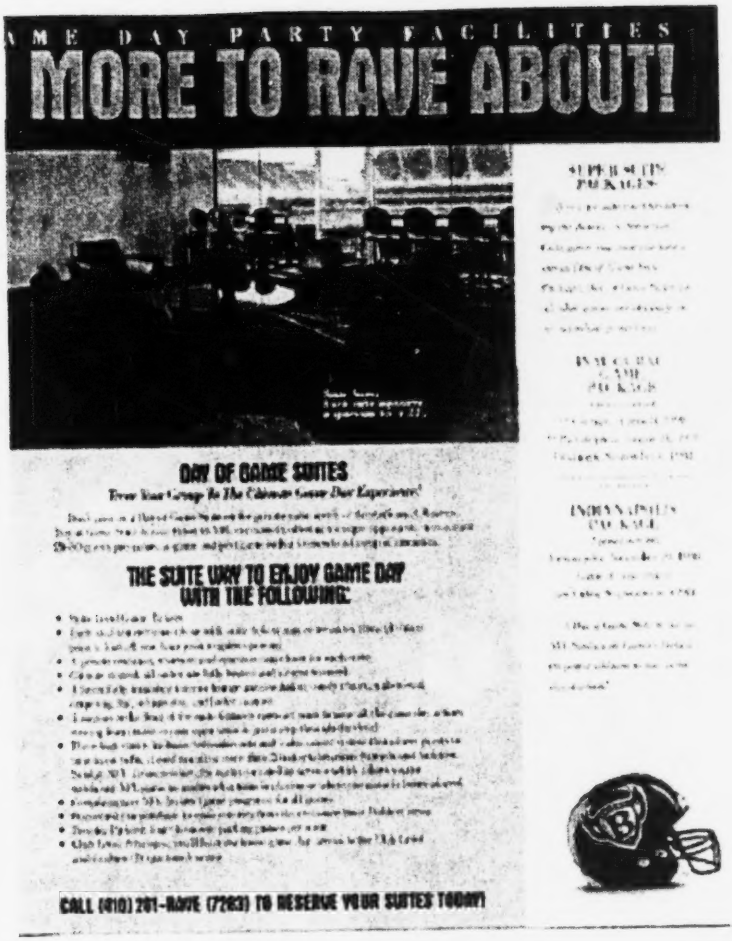
BBQ Chicken Quarters
Rib Eye Steak
Cole Slaw
Pasta Salad
Corn On The Cob
Chips
Draft Beer And Soft Drinks

Please Note, Menu Variations
And Substitutions Aren't Available.

A NEW WAY TO PARTY ON GAME DAY!

1998 Baltimore Ravens Game Day Party Facilities

Budweiser



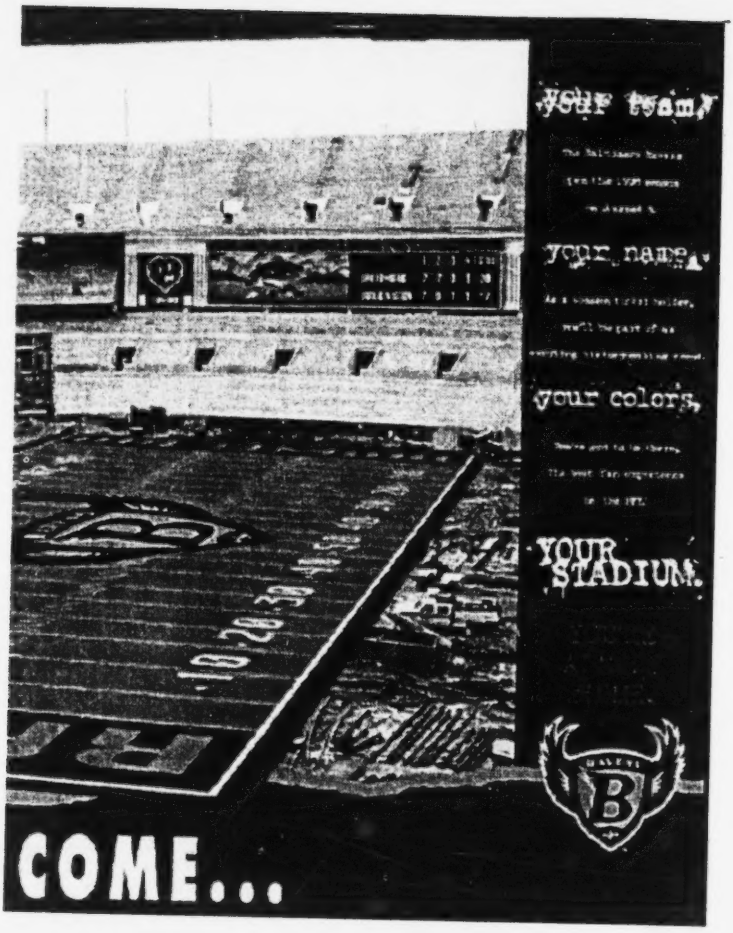
AME DAY PARTY FACILITIES

MORE TO RAVE ABOUT!

DAY OF GAME SUITES

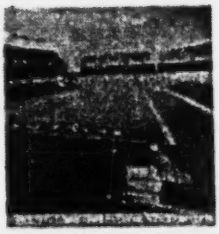
THE SUITE WAY TO ENJOY GAME DAY WITH THE FOLLOWING:

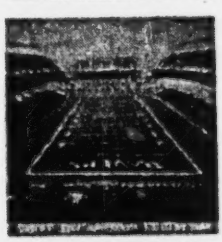
CALL (410) 261-RAVE (7283) TO RESERVE YOUR SUITES TODAY!


your team,
your name,
your colors,
YOUR STADIUM.
COME...

PERMANENT SEAT LICENSE

APPLICATION

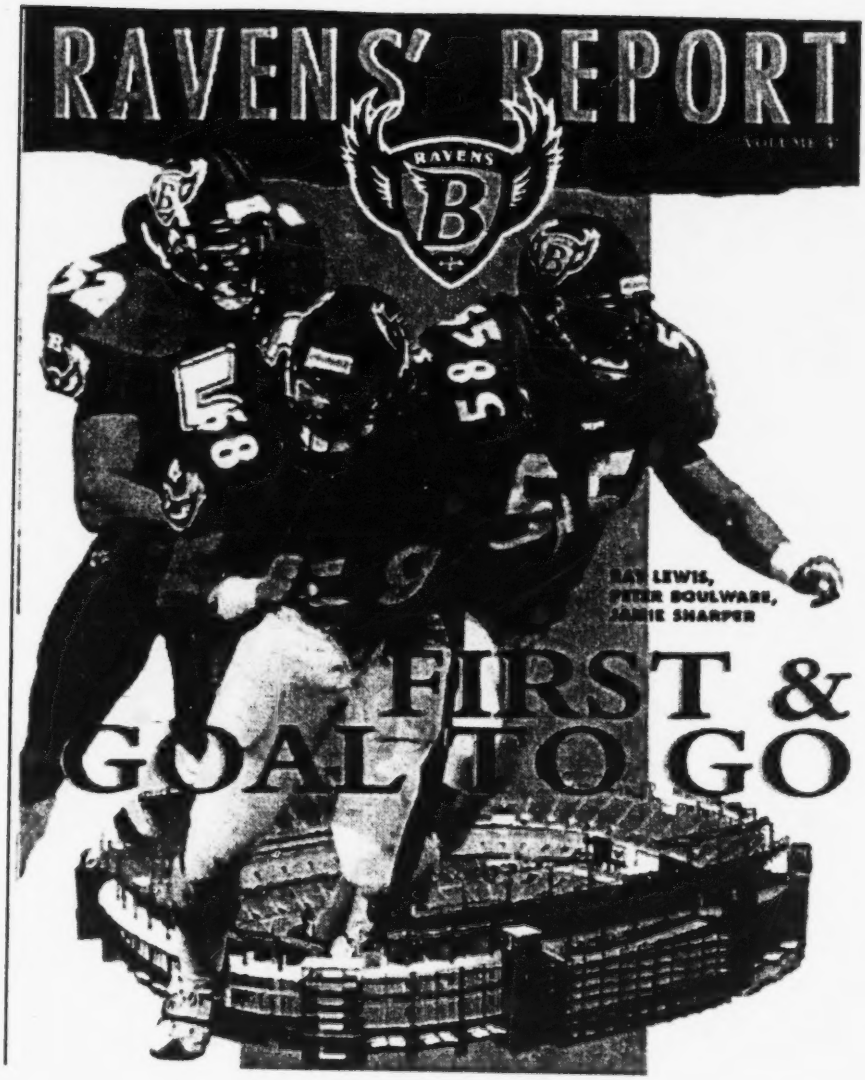


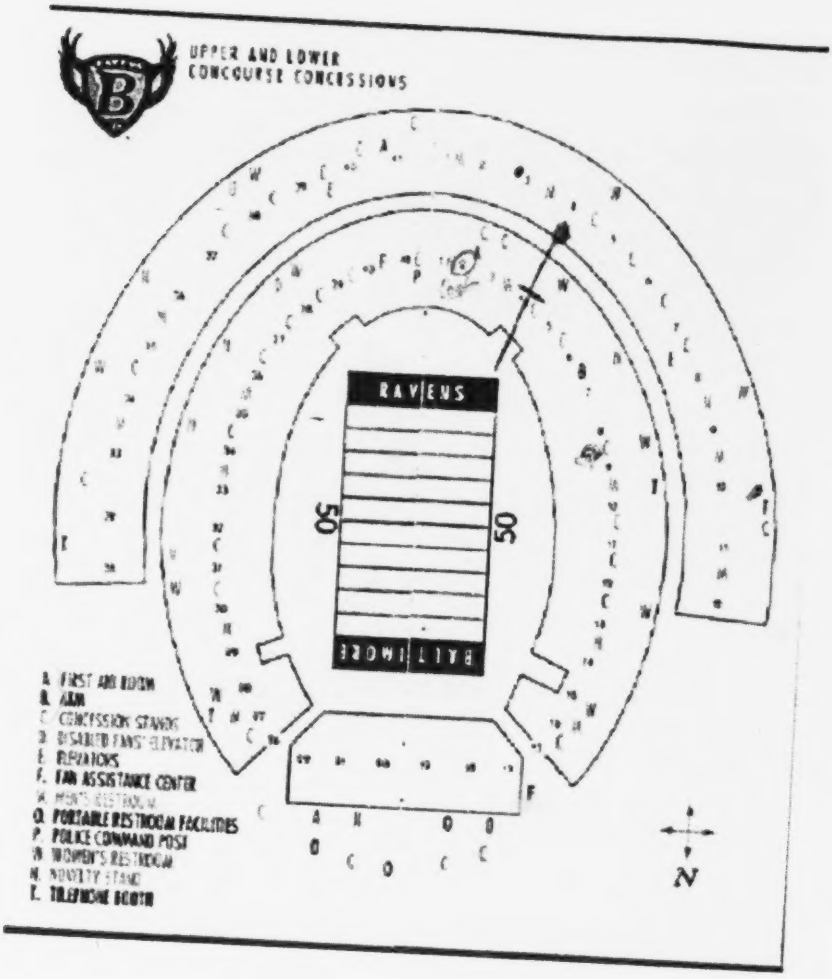


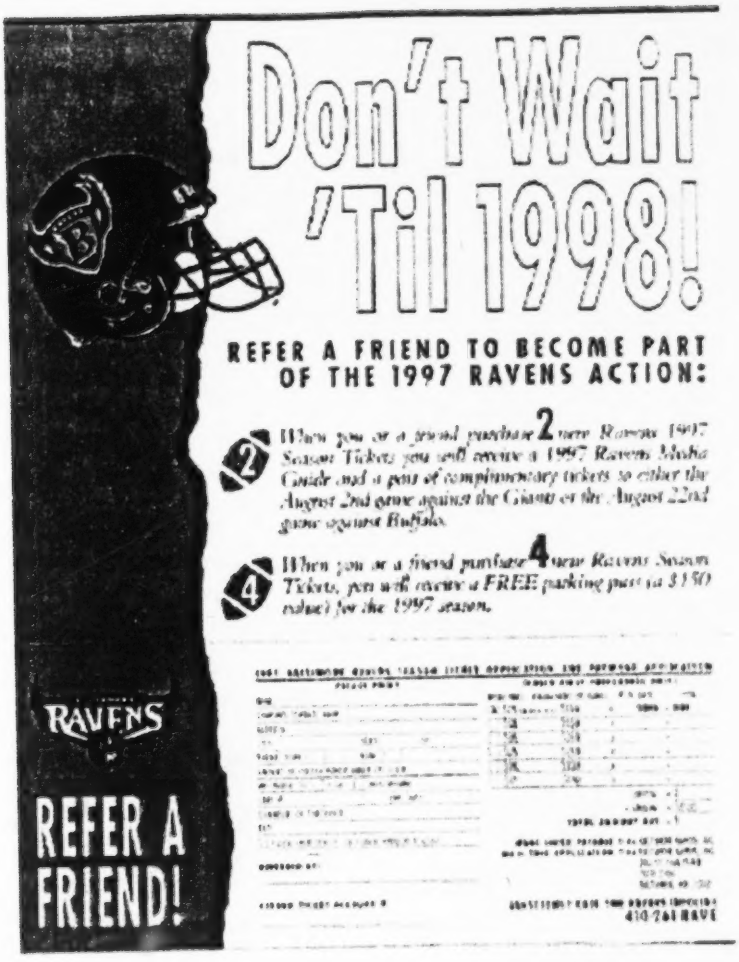
BALTIMORE RAVENS

REMEMBER: RAVENS' TICKET PRICES ARE THE SAME FOR 1998, 1999, AND 2000!

BALTIMORE RAVENS FOOTBALL AT CAMDEN YARDS
THE BEST IS YET TO COME!


RAVENS' REPORT
RAVENS
RAY LEWIS,
PEER BOULWARE,
JAMIE SHARPER
FIRST &
GOAL TO GO


UPPER AND LOWER
CONCOURSE CONCESSIONS
RAVENS
BALTIMORE
50
50
A. FIRST AID BOOTH
B. ATM
C. CONCESSION STANDS
D. DISABLED FANS' ELEVATOR
E. ELEVATORS
F. FAN ASSISTANCE CENTER
O. PORTABLE RESTROOM FACILITIES
P. POLICE COMMAND POST
W. WOMEN'S RESTROOM
T. TELEPHONE BOOTH
N


Don't Wait
'Til 1998!
REFER A FRIEND TO BECOME PART OF THE 1997 RAVENS ACTION:
When you or a friend purchase 2 new Ravens 1997 Season Tickets you will receive a 1997 Ravens Media Guide and a pair of complimentary tickets to either the August 2nd game against the Giants or the August 22nd game against Buffalo.
When you or a friend purchase 4 new Ravens Season Tickets, you will receive a FREE parking pass (a $150 value) for the 1997 season.
RAVENS
REFER A FRIEND!
410 761 RAVE

BALTIMORE RAVENS
200 St. Paul Place
Suite 2400
Baltimore, MD 21202

February 10, 1997

Mark W. Reynolds
36 S. Charles St. #1818
Baltimore, MD 21201-3102

Dear Mark W.

Now that the inaugural season of the Ravens' football has concluded, we want to thank you for your recent Permanent Seat Licensee (PSL) purchase. By making this commitment, you have helped bring NFL football back to Baltimore and we look forward to recording your name permanently in a special area of our new stadium.

We are pleased to enclose your PSL Zone(s) confirmation form and your PSL contract for the new NFL Camden Yards Stadium. **Your PSL contract should be signed (on the first page) and returned in the blue prepaid envelope by February 22, 1997.** Upon receipt of your signed PSL contract, the Ravens will countersign, and return a fully executed copy to you.

As a reminder, the Ravens have confirmed your PSL Zone at this time. Your exact row and seat location within your Zone will be assigned after the final seat count, in the spring of 1998.

Also enclosed is a second PSL invoice and your initial 1997 season ticket invoice for the first payment of 25%. Please refer to the table below with regard to payment schedules for PSLs and season tickets. As noted in your PSL brochure and application, the next PSL payment will be 30% of your total PSL commitment. These two payments will be due on March 15, 1997.

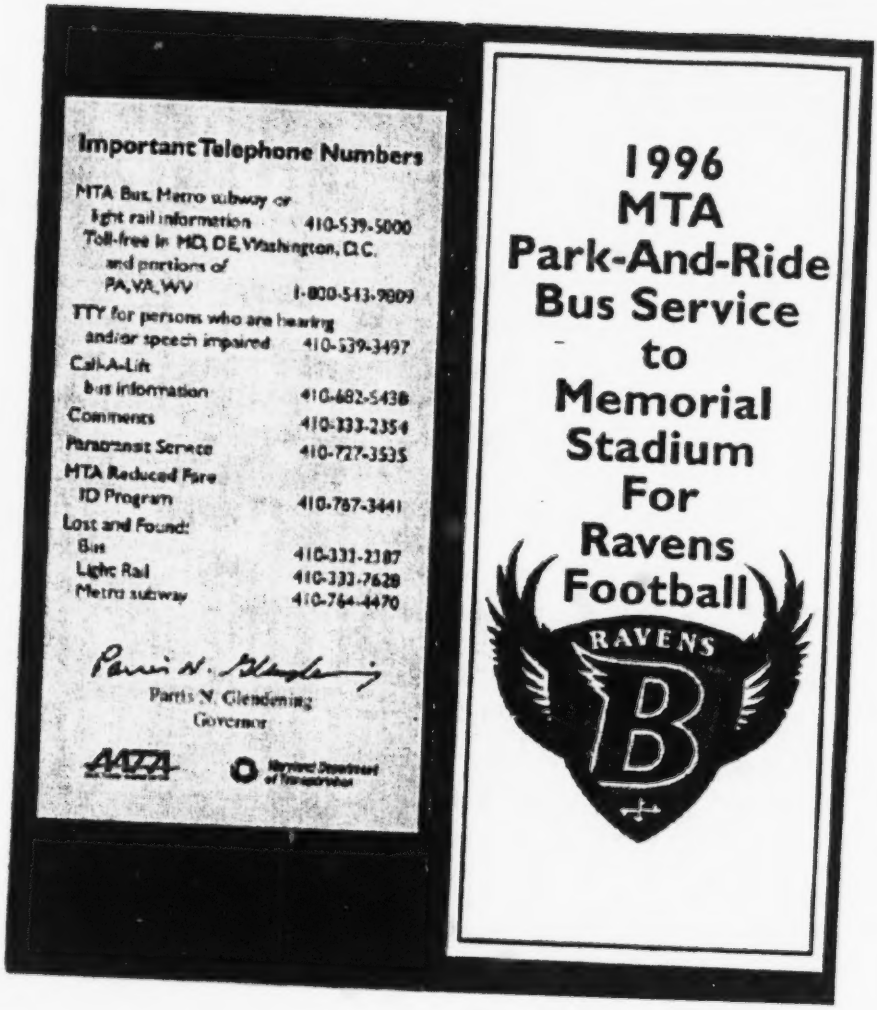
DATE	PAYMENT TYPE	AMOUNT OF PAYMENT
March 15, '97	PSL payment #2	30% of total PSL
March 15, '97	1997 Season Ticket payment #1	25% of total
May 15, '97	1997 Season Ticket final payment	75% of total
March 15, '98	PSL Final Payment	30% of total PSL

If you have any questions or concerns after reviewing the enclosed information, please contact our Customer Service Department at 410-261-RAVE (7283), or outside the 410 area code at 1-888-919-9797.

Thank you for your support. We look forward to you being part of the excitement during our final season at historic Memorial Stadium.

Sincerely,

/s/ Ray Sommerhof
Ray Sommerhof
Director of Ticket Operations


Important Telephone Numbers
MTA Bus, Metro subway or light rail information 410-539-5000
Toll-free in MD, DE, Washington, D.C. and portions of PA, VA, WV 1-800-543-9809
TTY for persons who are hearing and/or speech impaired 410-539-3497
Call-A-Lift bus information 410-682-5438
Comments 410-333-2354
Paratransit Service 410-727-3535
MTA Reduced Fare ID Program 410-767-3441
Lost and Found:
Bus 410-333-2187
Light Rail 410-333-7628
Metro subway 410-764-4470
Parris N. Glendening
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1996
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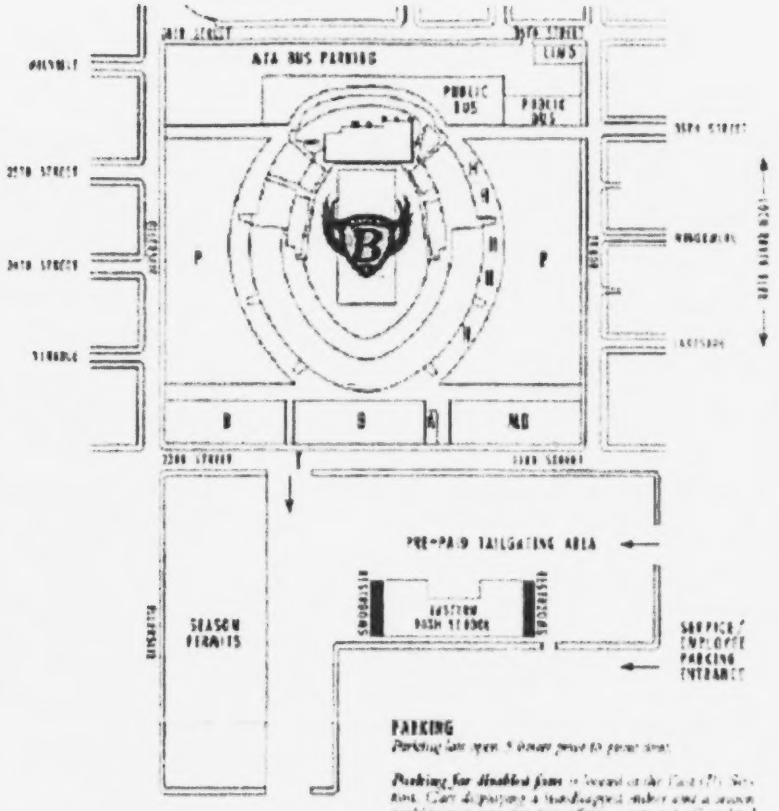
Ravens
Football
RAVENS
B



PARKING

A. RESERVED CLUB
B. RESERVED CLUB
H. HANDICAPPED
MD. MEDICAL
P. RESERVED GENERAL
T. TROUBLE TRUCK

PARKING

Parking lots open 5 hours prior to game time.

***Parking for disabled fans** is located in the East Lot (Lot T). Fans with a disabled parking permit may use any of parking lots. Disabled parking is limited and available on a first come, first served basis. For your convenience, we recommend anyone with disabilities arrive as early as possible.*

***Buses, RV's and all oversized vehicles** are required to enter via Lot A on 35th Street only. Pre-paid bus passes may be purchased in advance through Central Parking System. For any parking questions call Central Parking System at (480) 727-9130 between 8:00 a.m. and 7:00 p.m. Monday through Friday.*

RAVENS' TAILGATE ZONE APPLICATION

As a Season Ticketholder, you have the first opportunity to secure a place in the new "Ravens' Tailgate Zone" area. If you are interested in purchasing a pass for this lot, please return this form with a check, money order or credit card by July 23, 1997, and send to:

Baltimore Ravens' Tailgate Zone, 200 St. Paul Place, Suite 2400, Baltimore, MD 21202

APPLICANT

Season Ticket Account No. _____

Account Name _____

Address _____

City _____ St. _____ Zip _____

Work Phone _____ Home Phone _____

PASSES

Ravens' Tailgate Zone Pass $200.00 x _____ = _____

Reserved General (TP Lot) $150.00 x _____ = _____

Total Due _____

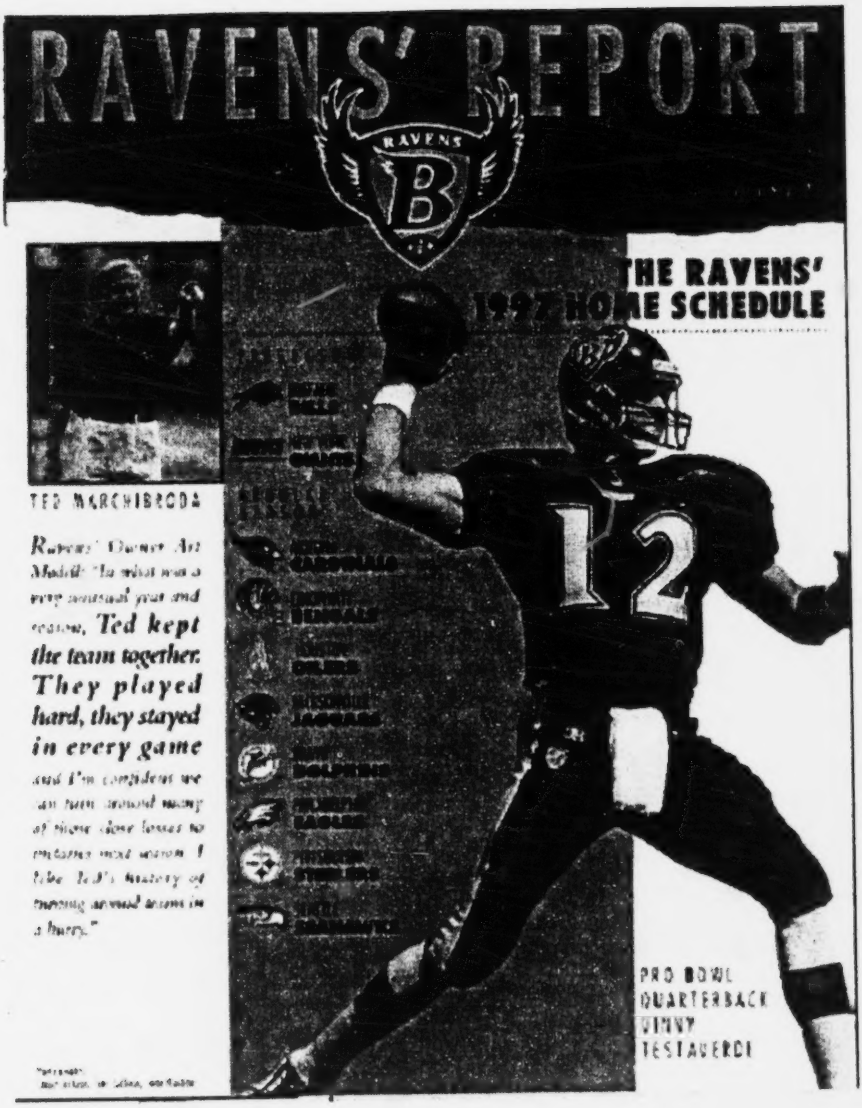
Credit For Current Reserved General Pass(es) (-) _____

Balance Due _____

PAYMENT

( ) Master Card ( ) Visa ( ) Check/M.O. Credit Card # _____ Exp. ____ Signature _____

Availability is limited. Orders will be filled on a first-come, first-served basis. No fax or telephone orders will be accepted.


RAVENS' REPORT
RAVENS
THE RAVENS'
1997 HOME SCHEDULE
TED MARCHIBRODA
Ravens' Owner Art Modell: "In what was a very unusual year and season, Ted kept the team together. They played hard, they stayed in every game and I'm confident we can turn around many of those close losses to victories next season. I like Ted's history of moving ahead when in a hurry."
PRO BOWL
QUARTERBACK
VINNY
TESTAVERDI

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

FREDERICK E. BOUCHAT,	*
Plaintiff	*
v.	*
BALTIMORE RAVENS, INC., et al.	*
Defendants	*

CIVIL ACTION NO.: MJG-97-1470

RULE 56(f) AFFIDAVIT OF COUNSEL
[Filed July 23, 2001]

1. My name is Howard J. Schulman. My business address is Schulman & Kaufman, LLC, 100 Light Street, Suite 1330, Baltimore, Maryland 21202. I am Plaintiff's counsel in this case. I have personal knowledge of the matters set forth herein. I am over 21 years of age. I am competent to testify.

2. I am submitting this Affidavit out of an abundance of caution, in accordance with what I understand to be the mandates of Rule 56(f), because some members of this Court, such as Judge Smalkin, require a Rule 56(f) Affidavit from counsel. My statements are based on my own personal knowledge and, where indicated, are based on my professional opinion and judgment.

3. As reflected in the docket entries to this case, the Complaint was filed on or about May 8, 1997. Relatively soon thereafter, the Court bifurcated this case at the request of the Defendants. The case was bifurcated

between liability and damages. As a consequence of the bifurcation, Plaintiff was unable to conduct any meaningful discovery concerning damages. Although Plaintiff had propounded Requests for Production of Documents and Interrogatories directed at the elements of 17 U.S.C., §504, the only information related to profits that Plaintiff received prior to the effectuation of the bifurcation was a list of the Defendants' licensees and sponsors and a document setting forth the percentage and ranking of the Ravens' licensed merchandise, ostensibly for the year end 1996. The jury returned a verdict in favor of the Plaintiff in November, 1998, and the Court granted Defendants' request for leave to take an interlocutory appeal and, at the same time, the Court continued the stay of discovery on damages/profits until the conclusion of the proceedings in the United States Court of Appeals. On February 5, 2001, the Court ordered that discovery proceed on the damages/profits phase of the case. On February 20, 2001, Plaintiff served Defendants with interrogatories, which Defendants declined to answer based upon the pending motion.[1] Among the information that Plaintiff requested and not

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[1] Plaintiff was required to file two Motions for Summary Judgment and served two other Motions to Compel upon the Defendants (Paper Nos. 166-68, 172-73). Thereafter, Judge Grimm required the parties to re-brief the issues in letter format. Copies of the argument letters submitted to Judge Grimm are attached hereto and incorporated by reference herein. Also attached hereto is a copy of financial statements produced at the New York offices of White & Case on April 24, 2001, in the exact form as produced to the Plaintiff. (NFLPD 0001-0006) In addition to these documents, Defendants produced approximately 8 large file drawer size boxes, which Defendants represented as samples of approximately 280 similar boxes from which Plaintiff could re-tabulate Defendants' profits attributable to Ravens licensed merchandise, which had already been entered into Defendants' computerized financial and bookkeeping systems.

provided by the Defendants was information identifying the names of persons who would have information concerning this phase of the proceedings, as well as the factual basis for the defense that the Defendants would make in this phase of the case and, more particularly, the specific facts and circumstances which the Defendants would assert in support of any motion for summary judgment. Copies of Defendants' discovery responses are attached. Now, more than four years after the onset of this litigation, Plaintiff still has had no opportunity to conduct any meaningful discovery concerning Defendants' profits.

4. It is counsel's professional opinion that Plaintiff has generated, by his response to the Motion for Partial Summary Judgment, a genuine dispute of material fact on the lines of revenue raised by the Defendants in their Motion. Nonetheless, Plaintiff has had no opportunity to establish a record and present to the Court, in proper Rule 56(e) form, the facts set forth in Plaintiff's Memorandum in Opposition to Motion for Summary Judgment. For instance, Plaintiff points to statements made by David Modell and Bruce Burke on or about June 5, 1996 which appeared in an article in the Baltimore *Sun*, but has had no opportunity to present these statements in the appropriate Rule 56(e) form because of the absence of discovery in this phase of the case. It is my understanding that Mr. Morgan, as is the course and practice of most newspaper reporters, will not testify unless subpoenaed to do so, to confirm the statements made in the article. Likewise, Mr. Burke, who can be expected to be a hostile witness, does not reside in Maryland, to Plaintiff's knowledge, and resided during the liability stage in Connecticut and was then employed by National Football League Properties in New York

City. Similarly, Plaintiff did not have an opportunity to see the detail of the Defendants' financial books and records. Thus, for example, while it is Plaintiff's belief that the sponsorship and media revenues, etc., are paid over a period of time and would, therefore, be revenue during the period of time in which the Ravens utilized Mr. Boychat's logo, there is, as such, no means for Plaintiff to challenge the Defendants' assertions that Defendants' earnings were generated before third parties had even previewed the infringing work. Plaintiff has no information concerning how or why NFLP redesigned or created other NFL team logos. Similarly, Plaintiff has had no opportunity to correlate ticket sales to Defendants' marketing efforts. *See* Defendants' Memorandum, at 15. Likewise, Plaintiff has not had access to any of the sponsorship or television contracts or related documents in order to establish the specific terms in those agreements addressing the use of NFL marks or to examine the negotiations leading up to those contracts. Plaintiff has not had an opportunity to review the financial books and records of those teams Defendants state had no change in revenue. Likewise, Plaintiff has not had an opportunity to review the NFLP files concerning the entities whose personnel submitted affidavits in support of the Defendants' Motion for Summary Judgment. To the contrary, for example, Plaintiff attempted to take the deposition of WLIF (Infinity Radio) and Group W Television (Channel 13) on May 3, 2001. Plaintiff's counsel initially received a protest from Anthony M. Bongiorno, Esquire, Assistant General Counsel for CBS, on behalf of WLIF and Group W Television, both of which are apparently CBS-owned entities. After Plaintiff's counsel had understood that the concerns raised by CBS had been answered and that the materials requested would be produced, CBS again

changed course and abruptly reneged on its agreement. The course of correspondence is attached as is the notice of deposition. The next that Plaintiff's counsel knew of CBS's involvement in this matter was the Affidavit of Sean McManus, the President of CBS Broadcasting, Inc., and Robert Philip of Infinity Broadcasting, in support of the Defendants' Motion.

5. David Modell states in his Affidavit, Paragraph 9, that the Ravens sold many tickets, personal seat licenses and luxury boxes before any logo was unveiled. Plaintiff should have a full and fair opportunity to review the Ravens' records to verify this statement, as well as its billings, marketing, and other records related to this statement. Additionally, with respect to ticket and general revenues, Defendants have not produced nor has the Plaintiff been permitted to inquire into the details and the nature and extent of the Defendants' marketing and advertising activities, Defendants' advertising, marketing and public relations budgets, nor to take depositions of the Ravens' in-house and outside public relations and marketing people. The only information that Plaintiff has had available to him to submit to the Court regarding the Defendant Ravens' marketing activities, is some, but not all, of the materials distributed to actual and potential season ticket holders and Personal Seat Licensees, which materials were obtained outside of discovery. Nor does Plaintiff have any information concerning the cost of redoing or replacing the infringing work. Plaintiff has not had an opportunity to obtain actual attendance figures and ticket sales information from Defendants but, instead, has had to obtain this information from business journals such as *Street & Smith Business Journals*, but has not had an opportunity to confirm the particular revenues. *See*

attached *Street & Smith* December 7, 1998 game attendance analysis, published bi-weekly during the football season.

6. I have in my possession videotapes of some Ravens' football games, in which the logo is clearly used and displayed during ticket sales for individual games. Others reflect the use of the logo by the network to display Ravens' scores during half-time shows. I have not had an opportunity to authenticate such tapes, through request for admissions or other discovery devices. I have not had an opportunity through discovery to determine how many viewers watched telecasts in which the logo was displayed or otherwise to estimate how many people saw it. Plaintiff has been unable to obtain more specific information because of the restrictions placed on the discovery process to date.

7. Defendants have yet to provide any specific and/or complete information concerning the details of the Defendants' revenues, although requested to do so by the Plaintiff. Defendant Baltimore Ravens has not provided any financial information concerning the lines of revenues in question. Plaintiff's counsel was able to obtain from the *Los Angeles Times* website a copy of a document introduced by the Oakland Raiders in their recent case in Los Angeles, California against the National Football League and National Football League Properties, which document (NFL 20652)(Plaintiff's Exhibit "A"), which is part of Raiders' Exhibit 681, and was introduced as a trial exhibit. This is the only information that Plaintiff has concerning Ravens' revenues from sources other than incomplete information concerning licensed merchandise. Plaintiff has been unable through discovery as yet, because of the

restrictions imposed upon the discovery process, to verify this information. Likewise, Plaintiff has been provided consolidated financial statements of NFLP, which reflect only gross figures for lines of revenue, such as consumer products, corporate sponsorships, publishing, etc. Defendant NFLP has refused to provide more detailed information.

8. The only self-evident principles involved in Defendants' Motion for Summary Judgment are that the Defendants have refused to provide discovery and then submit Affidavits to support the factual assertions of their Motion.

Pursuant to 28 U.S.C., §1746, I affirm under the penalty of perjury that the foregoing is true.

/s/ Howard J. Schulman
Howard J. Schulman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

FREDERICK E. BOUCHAT,	*
Plaintiff	*
v.	*
BALTIMORE RAVENS, INC., et al.	*
Defendants	*

CIVIL ACTION NO.: MJG-97-1470

PLAINTIFF'S RULE 56(f) AFFIDAVIT

1. My name is Frederick E. Bouchat. I am the Plaintiff in this case. I have personal knowledge of the matters set forth herein. I am over 21 years of age. I am competent to testify.

2. I understand that the Defendants in this case have filed a Motion for Summary Judgment. I also understand that the Court has not allowed any discovery in this present stage of litigation from the Defendants, except for that related to licensed merchandise.

3. For the reasons stated in the Affidavit of my attorney, Howard J. Schulman, also submitted this date, I am requesting that the Court permit discovery to support my opposition to Defendants' Motion for Summary Judgment.

Pursuant to 28 U.S.C., §1746, I affirm under the penalty of perjury that the foregoing is true.

/s/ Frederick E. Bouchat

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION
Civil Action No. MJG-97-1470

FREDERICK E. BOUCHAT,
Plaintiff,

v.

BALTIMORE RAVENS, INC. and NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.,
Defendants.

AFFIDAVIT OF ROBERT APTER

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

Robert Apter, being duly sworn, deposes and says:

1. I am the Senior Vice President, Finance and Administration, for ABC Sports ("ABC"). I have worked at ABC Sports since 1969. I make this affidavit in support of Defendants' Motion for Partial Summary Judgment based on personal knowledge, and I am competent to testify to the matters stated herein.

2. Since 1970, ABC has held the exclusive rights to broadcast the Monday night football games of the National Football League ("NFL"). The current broadcast rights agreement between the NFL and ABC was reached in 1998.

3. I am familiar with the negotiating process and the economics relating to the current broadcast rights agreement between the NFL and ABC, and I have been involved with the production of ABC's top-rated "Monday Night Football" program for many years. The appearance or design of a logo of any of the NFL's teams (the "Member Clubs") does not affect ABC's decision to bid on the broadcast rights for NFL games, or the amount of ABC's bid for such rights. In fact, I have never known the creative aspects of any particular team logo to be a selling point for ABC in considering a broadcast rights deal with any sports league.

4. The value to ABC of its broadcast rights agreement with the NFL does not derive from the creative elements of any one Member Club logo. Many factors, including the high quality of NFL football and the audience interest in the NFL's product, drive ABC to seek the rights to broadcast NFL games. The appearance or design of a team's logo simply is not a factor for ABC.

5. At no time from 1996 through 1999 did ABC experience any increase in ratings for its broadcasts of Monday night NFL games that I believe can be attributed to the Ravens' adoption (1996) or abandonment (1999) of the winged shield logo. In fact, ABC did not broadcast a single game featuring the Ravens during the 1996 through 1999 NFL football seasons.

Dated: New York, New York

/s/ Robert Apter
Robert Apter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

FREDERICK E. BOUCHAT,
Plaintiff,

V.

BALTIMORE RAVENS, INC. and NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.,
Defendants.

Civil Action
No. MJG-97-1470

State of California)
: ss
County of Los Angeles)

AFFIDAVIT OF THE QUAKER OATS COMPANY

THOMAS E. FOX, being duly sworn, deposes and says:

1. I am the Vice President – Sports and Event Marketing at The Quaker Oats Company ("Quaker"), maker of Gatorade brand sports and fitness products. My company is a national corporate sponsor of the National Football League ("NFL"). I make this affidavit in support of Defendants' Motion for Partial Summary Judgment based on personal knowledge, and I am competent to testify as to the matters stated herein.

2. My responsibility includes negotiating sponsorship arrangements between Quaker and other companies deemed to be attractive corporate sports

partners. I have held my current responsibility since April 1999, and I have negotiated two agreements with the NFL for sponsorship by Quaker.

3. Under Quaker's sponsorship agreement with National Football League Properties ("NFLP"), Gatorade Thirst Quencher holds a variety of positions including Official Sports Beverage of the NFL. Along with such status comes certain rights, including the right to use and display the marks NATIONAL FOOTBALL LEAGUE, NFL, the NFL Shield, AFC, NFC, SUPER BOWL, PRO BOWL, and the right to use and display the logos of each one of the NFL's member clubs ("Member Club").

4. Quaker first became an NFL sponsor in the 1980's. The appearance or design of any of the Member Club logos never entered into Quaker's decision to explore a sponsorship opportunity with NFLP. Since Quaker became a sponsor, the appearance or design of any one logo of any one NFL Member Club has never factored into Quaker's decision to remain a sponsor. In my experience negotiating ongoing sponsorship agreements with NFLP on behalf of Quaker, Quaker's decisions regarding how much to offer or pay for an NFL sponsorship have never depended on the appearance or design of any one logo of any one NFL Member Club. In fact, numerous Member Clubs' logos have changed during Quaker's tenure as an NFL sponsor with no effect to Quaker's sponsorship business or decisions.

5. Quaker's initial NFL sponsorship predated the introduction of the Baltimore Ravens "winged shield logo" in 1996. The fact that the winged shield logo was a part of NFLP's sponsor package in 1996 did not factor at all into Quaker's decision to remain a sponsor

subsequently. During the Baltimore Ravens' use of the winged shield logo, at no time did Quaker consider the value of its sponsorship package increased by the appearance or design of the logo. In 1999, when the Baltimore Ravens ceased using the winged shield logo, Quaker did not consider the value of its sponsorship package to have decreased in any way. At no time since 1998 did Quaker consider terminating or seeking to re-negotiate its sponsorship arrangement with NFLP due to any changes in the Ravens' logos.

6. The value to Quaker of its NFL sponsorship is not derived from the creative elements of any one Member Club logo. From a marketing perspective, Quaker seeks to align its Gatorade products with the world's top athletic performers. The NFL sponsorship is valuable to Quaker because of the NFL's overall popularity, the quality of its athletes and its long history of facilitating and showcasing the very best performances of those athletes. The opportunity to tap into the goodwill of the NFL, and to receive the benefit of NFLP's marketing and promotion expertise, drove Quaker to become and remain a national sponsor of the NFL.

Dated: Los Angeles

June 20, 2001

THE QUAKER OATS COMPANY

By: _____

Thomas E. Fox

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

FREDERICK E. BOUCHAT,
Plaintiff,

V.

BALTIMORE RAVENS, INC. and NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.,
Defendants.

Civil Action
No. MJG-97-1470

AFFIDAVIT OF PEPSI-COLA COMPANY

State of Maryland)
: SS
County of Baltimore)

Liam Fuller, being duly sworn, deposes and says:

1. I am the Field Marketing Director at Pepsi-Cola Company ("Pepsi"). My company is a corporate sponsor of Baltimore Ravens, Inc. (the "Ravens"), one of the defendants in this action. I make this affidavit in support of Defendants' Motion for Partial Summary Judgment based on personal knowledge, and I am competent to testify as to the matters stated herein.

2. My responsibility includes negotiating sponsorship arrangements between Pepsi and other companies deemed to be attractive corporate partners. I have held my current responsibility since 1995.

3. Pepsi's agreement with the Ravens grants to Pepsi products the status of official soft drink and official water of the Baltimore Ravens. Along with such status comes certain rights, including the right to use and display the Ravens' logos.

4. Pepsi first became a sponsor of the Ravens in 1996. At no point in the decision to become a sponsor was the appearance or design of any single Ravens logo a factor. In my experience negotiating ongoing sponsorship agreements with the Ravens on behalf of Pepsi, the appearance or design of any one Ravens logo has never factored into Pepsi's decision to remain a sponsor, or into Pepsi's analysis of how much to pay for its sponsorship.

5. Pepsi signed on to be a sponsor of the new NFL franchise in Baltimore before introduction of the Baltimore Ravens' "winged shield logo" in June 1996. The winged shield logo had no impact on Pepsi's decision to become or remain a sponsor. During the period when the winged shield logo was in use by the Baltimore Ravens, at no time did Pepsi consider the value of its sponsorship enhanced by the creative elements of the logo. In 1998, when the Baltimore Ravens discontinued use of the winged shield logo, Pepsi did not consider the value of its sponsorship diminished by such discontinuance. At no time in 1998 did Pepsi consider withdrawing from or re-negotiating its sponsorship arrangement with the Ravens due to any changes in the team's logos.

6. The value to Pepsi of its Ravens sponsorship is not derived from the creative elements of any one logo. The sponsorship is valuable to Pepsi because of the high quality of the on-field product offered by the Ravens and visiting NFL teams, the popularity and rich history of professional football in Baltimore, and the tremendous goodwill that the Ravens franchise has built in the state of Maryland since 1996. The opportunity to affiliate itself with this quality, history and goodwill is what caused Pepsi to become and remain a sponsor of the Baltimore Ravens.

Dated:Columbia, Maryland June 19th, 2001

Pepsi-Cola Company

By: _____

State of Maryland County of Howard

Scribed and affirmed before me this

19th day of June, 2001 by Liam Fuller.

My commission expires September 23, 2002.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION
Civil Action No. MJG-97-1470

FREDERICK E. BOUCHAT,
Plaintiff,
v.

BALTIMORE RAVENS, INC. and NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.,
Defendants.

AFFIDAVIT OF DENNIS LEWIN

STATE OF NEW YORK
COUNTY OF NEW YORK

DENNIS LEWIN, being duly sworn, deposes and says:

1. I am the Senior Vice President for Broadcasting and Network Television at the National Football League ("NFL"). I am responsible for overseeing relationships between the NFL and its television partners, and I am involved in all negotiations relating to television contracts. I make this affidavit in support of Defendants' Motion for Partial Summary Judgment based on personal knowledge, and I am competent to testify as to the matters stated herein.

2. I have held this or a similar position in the broadcast department with the NFL since 1997. Previously, I worked for 30 years at ABC Sports,

where, among my responsibilities, I oversaw relationships between ABC Sports and many sports organizations.

3. The broadcast rights to NFL games are valuable because NFL football attracts large numbers of viewers due to its high quality, competitiveness, the personalities and athleticism of its players, and its overall popularity as the top spectator sport in the United States. Indeed, watching broadcasts of NFL football has become a weekly ritual for millions of fans throughout the country and the world. These large audiences allow a broadcaster to offer advertising during NFL games to its customers at favorable rates.

4. In my experience, I have never known the appearance or design of one logo of one NFL Member Club to factor into a broadcaster's decision to bid on NFL broadcast rights, or into the amount offered for those rights. In my long experience in sports television, I have never known the appearance or design of a team logo to factor into a broadcaster's decisions regarding negotiations or renewals for broadcast rights at all. Further, I have never known a broadcaster to bargain for the right to terminate a broadcast rights agreement or seek a reduction in its rights fees due to a change in the design or appearance of a team logo. This is despite the fact that eight (8) NFL Member Clubs (New England Patriots, Philadelphia Eagles, Cleveland Browns-Baltimore Ravens, Denver Broncos, Tampa Bay Buccaneers, New York Jets, Tennessee Oilers-Tennessee Titans and New York Giants) have significantly changed their logo system over the past seven (7) years.

5. In 1996, the Cleveland Browns moved to Baltimore, became the Baltimore Ravens, and began using the "winged shield" logo. At the time of change of logos from the plain orange helmet of the Cleveland Browns to the winged shield logo, no broadcaster expressed that the change had any impact on that broadcaster's view of the value of its broadcast rights. Similarly, in 1999, when the Baltimore Ravens discontinued use of the winged shield logo, to my knowledge, there was no change in the broadcasters' view of the value of their broadcast rights. No broadcast partner sought to broadcast either more or fewer Baltimore Ravens games during the 1999 season because of the logo change. While I am aware that one or more of the NFL's broadcast partners have confirmed this view in an accompanying affidavit, I am certain that, if required by the Court, all of our broadcast partners would similarly confirm this view.

6. My observations are borne out by the actual ratings of NFL broadcasts during this period. In fact, there was a significant decrease in the average percentage of local market households viewing games featuring the Baltimore Ravens in 1996 over the average rating for games featuring the Cleveland Browns in 1995. Specifically, in 1995, 57 percent of the households watching television during Browns games in the Cleveland market were tuned to the Browns game while, in 1996, 32 percent of the households watching television during the Ravens games in the Baltimore market were tuned to the Ravens game. This number was at 29 percent for the 1998 season, the year prior to the Ravens' change to the current logo. During the 1999 season, after the Ravens discontinued use of the winged shield logo, there was no decrease in the average rating for games featuring

the Ravens, compared to the average rating for Ravens games in 1998. Specifically, in 1999, as in 1998, 29 percent of the households watching television during the Ravens games in the Baltimore market were tuned to the Ravens game.

Dated: New York, New York June 19,2001

_____

Dennis Lewin

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

FREDERICK E. BOUCHAT,
Plaintiff
v.
BALTIMORE RAVENS, INC.
and NATIONAL FOOTBALL LEAGUE
PROPERTIES, INC.,
Defendants.

Civil Action No. MJG-97-1470

AFFIDAVIT OF CBS BROADCASTING, INC.

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

SEAN McMANUS, being duly sworn, deposes and says:

1. I am the President of CBS Broadcasting, Inc. ("CBS"). I make this affidavit in support of Defendants' Motion for Partial Summary Judgment based on personal knowledge, and I am competent to testify as to the matters stated herein.

2. My responsibilities include negotiating broadcast rights agreements with sports leagues and other operators of sporting events. I have held my current position since 1996, and I was involved in the negotiation of CBS' current broadcast rights contract with the National Football League (the "NFL").

3. The current broadcast rights agreement between the NFL and CBS was entered into in 1998. This agreement grants to CBS the right to broadcast NFL games on Sunday afternoons primarily featuring the NFL teams ("Member Clubs") that play in the American Football Conference ("AFC"). During a full season, CBS will carry games featuring most, if not all, of the NFL teams. The broadcast rights to NFL games are valuable to CBS because NFL football, as the premier professional spectator sport in the United States, attracts millions of viewers nationwide to CBS' stations and affiliates. These large audiences, drawn by the consistently high quality of the on-field product, enhance the value of CBS' association with the NFL, allowing CBS to offer and sell advertising during NFL games.

4. The value to CBS of its broadcast rights agreement with the NFL is not derived from the creative elements of any one Member Club logo. CBS' decision to bid on the broadcast rights for NFL games and the amount of its bid for such rights were not influenced at all by the creative elements of any logo of any NFL Member Club. In my experience in broadcast television, I have never known the creative aspects of a team logo to factor into a broadcast company's decisions regarding the negotiation of a broadcast rights agreement with a league. In fact, we expect that, during the term of an agreement, a number of teams will elect to make changes to their logo system.

5. Specifically, with regard to this matter, in 1996, the Cleveland Browns moved to Baltimore, became the Baltimore Ravens, discontinued use of the Browns' plain orange helmet, and began using the "winged shield" logo. In 1999, when the Baltimore Ravens

discontinued use of the winged shield logo, CBS' view of the value of its broadcast rights was unaffected. CBS did not seek to increase or decrease the number of Baltimore Ravens games it broadcast during the 1999 season because of the logo change. At no time after 1998 did CBS consider negotiating its broadcast rights agreement because of the logo change.

6. The actual ratings of NFL broadcasts on CBS during this period illustrate CBS' indifference to the specific creative aspects of the logos of the Baltimore Ravens. During the 1999 season, after the Ravens discontinued use of the winged shield logo, there was no decrease – and, in fact, there was an increase – in the average share for CBS games featuring the Ravens, compared to the average share for such games in 1998. Specifically, in 1998, 29 percent of the households watching television in the Baltimore market during CBS-broadcast Ravens games were tuned to the Ravens game. In 1999, the year after the adoption of the Ravens' current logo, the average percentage of Baltimore market households tuned to Ravens games during CBS-broadcasts of such games was actually higher at 30 percent.

Dated: New York, New York

CBS BROADCASTING, INC.

By: _____

June 18, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION
Civil Action No. MJG-97-1470

FREDERICK E. BOUCHAT,
Plaintiff,

v

BALTIMORE RAVENS, INC.
and NATIONAL FOOTBALL LEAGUE
PROPERTIES, INC.,
Defendants.

AFFIDAVIT OF DAVID MODELL

STATE OF MARYLAND)
: ss.:
COUNTY OF BALTIMORE)

DAVID MODELL, being duly sworn, deposes and says:

1. I am the President of Baltimore Ravens, Inc. ("Ravens" or "Ravens Club"), one of the defendants in this action. I am responsible for overseeing all aspects of the operation of the Ravens Club, including relationships and negotiations with corporate sponsors and broadcast partners. I make this affidavit in support of Defendants' Motion for Partial Summary Judgment based on personal knowledge, and I am competent to testify as to the matters stated herein.

2. I have held my current position with the Ravens since 1999. Previously, I was the Executive Vice President and Assistant to the President of the Ravens, and Director of Marketing of the Cleveland Browns ("Browns"). I have been involved in the operations of the Ravens and the Browns for a total of 17 years.

3. As an executive of the Ravens, I oversee the negotiation of corporate sponsorships between the Ravens and companies seeking local affiliations with the team and its fans. I similarly oversee the negotiation of agreements with Baltimore-area broadcasters seeking to broadcast Ravens games and other Ravens-related content.

4. Generally, a sponsorship arrangement with the Ravens confers certain rights, including the right to employ a designation (e.g., "the official auto dealership of the Baltimore Ravens"), and the right to use and display the Ravens Club's logos.

5. In my experience as an executive of both the Browns and the Ravens, I have never known the appearance or design of any particular logo of either team to factor into a company's decision to become or remain a sponsor.

6. During the period of my employment with the Browns, whose logo consisted of an orange helmet with brown and white stripes, no sponsor or potential sponsor ever attempted to negotiate any aspect of a sponsorship, including the fee, based upon the aesthetic characteristics of the logo.

7. Since the Ravens commenced operations in 1996, I have never known a sponsor to attempt to negotiate any aspect of a sponsorship, including the fee, based upon the aesthetic characteristics of any one of the Ravens Club's logos. In 1996, the Ravens signed many sponsors before the unveiling of the team's logos. Indeed, companies approached me to become sponsors before the new Baltimore NFL franchise had even been named. When the Ravens discontinued use of the winged shield logo in 1999, no sponsor sought to renegotiate on that basis.

8. In my experience overseeing the negotiation and performance of broadcast rights agreements with local broadcasters, I have never known the aesthetic or creative elements of any Ravens logo to factor into any aspect of a broadcaster's decision to become or remain a broadcast partner of the Ravens Club, including the amount of the broadcast rights fee. Further, I have never known a local broadcaster to bargain for the right to modify or or terminate a broadcast rights agreement in the event of a change in the design or appearance of a logo of the Ravens Club. The Ravens' adoption and later discontinuance of the winged shield logo had no impact on the Ravens Club's relationships with its broadcast partners.

9. From 1996 to 1999, the Ravens Club made general use of the winged shield logo in the course of its day-to-day operations, including use on team stationery, on game tickets and at various points in both Memorial Stadium and PSI Net Stadium. To my knowledge, no company entered into a business relationship with the Ravens Club because of the presence of the winged shield logo on the Ravens Club's stationery. The Ravens Club

set all ticket prices without regard to the aesthetic appeal of its logos. In 1996, the Ravens sold many tickets, personal seat licenses and luxury boxes before any logo was unveiled.

10. In my experience, the true value of a sponsorship is the opportunity for a company to associate its business with the Baltimore Ravens and with the revival of professional football in Baltimore, thus allowing the sponsor to market to the Ravens Club's large and loyal fan base. It is this opportunity that drives sponsorship deals and serves as the Ravens Club's most valuable selling point.

11. Also based on my experience, the value of a broadcast rights agreement with the Ravens is not derived from the creative elements of any one of the team's logos. The broadcast rights to Ravens games are valuable to a television station because the popularity of Ravens football attracts large numbers of desirable viewers to those station's broadcasts. These large audiences, and the broadcaster's association with the Ravens, allows it to offer advertising slots to its customers at favorable rates. Neither the revenues garnered by the Ravens Club's broadcast partners, nor the rights fees that they invest in order to achieve those revenues, has any connection to the appearance or design of any of the team's logos.

Dated: Baltimore, Maryland
June 15, 2001

/s/David Modell

Sworn to before me this
15 day of June, 2001
/s/Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION
Civil Action No. MJG-97-1470

FREDERICK E. BOUCHAT,

Plaintiff,

v.

BALTIMORE RAVENS, INC. and
NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.,

Defendants.

AFFIDAVIT OF ROBERT PHILIPS

STATE OF MARYLAND)
: ss.:
COUNTY OF BALTIMORE)

ROBERT PHILIPS, being duly sworn, deposes and says:

1. I am the Vice President and General Manager of several radio stations owned by Infinity Broadcasting ("Infinity"), including WQSR and WJFK (the "Stations"). Infinity holds the exclusive radio broadcast rights to all pre-season and regular season games of the Baltimore Ravens ("Ravens" or "Ravens Club"). I make this affidavit in support of Defendants' Motion for Partial Summary Judgment based on personal knowledge, and I am competent to testify as to the matters stated herein.

2. My responsibility includes negotiating broadcast nights agreements with Baltimore-area sports teams and operators of local sporting events. I have been a station general manager for Infinity stations since 1998, and I was involved in the negotiation of the Stations' current broadcast rights contract with the Ravens. I have Worked in the radio broadcasting business for 16 years.

3. The current broadcast rights agreement between the Ravens and the Stations was entered into in February, 2001. In no way did the appearance or design of any one Ravens logo factor into Infinity's decision to bid on the broadcast rights for Ravens games, or on the amount of the bid entered by Infinity for such rights. In my experience in broadcasting, I have never known the appearance or design of a team logo to factor into a broadcast company's decisions regarding the negotiation of a broadcast rights agreement. I have never known the creative aspects of a particular logo to be a selling point for a broadcast company considering a broadcast rights deal with a sports team.

4. During the 1999 season, after the Ravens discontinued use of the winged shield logo, there was no decrease in the average rating for Ravens games, compared to the average rating for Ravens games in 1998.

5. The value to Infinity of its broadcast rights agreement with the Ravens Club is not derived from the creative elements of any one of the team's logos. The broadcast rights to Ravens games are valuable to Infinity because the popularity of professional football in Baltimore, and particularly the popularity of Ravens football, attracts large numbers of listeners to Infinity's

stations on Sunday afternoons. These large audiences, and Infinity's association with the Ravens Club, allow Infinity to offer advertising slots to its customers at favorable rates. Such rates, and the accompanying revenue, have no connection to the appearance or design of any of the team's logos.

Dated: Towson, Maryland
June 21, 2001

/s/Robert Philips

Sworn to before me this
21 day of June, 2001

/s/Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION
Civil Action No. MJG-97-1470

FREDERICK E. BOUCHAT,
Plaintiff,

v.

BALTIMORE RAVENS, INC. and
NATIONAL FOOTBALL LEAGUE
PROPERTIES, INC.,
Defendants.

AFFIDAVIT OF JAMES SCHWEBEL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES SCHWEBEL, being duly sworn, deposes and says:

1. I am the Senior Vice President for Corporate Sponsorships at National Football League Properties, Inc. ("NFLP"), one of the defendants in this action. I am responsible for overseeing the sales, identification, marketing, structuring, negotiation and servicing of all sponsorship opportunities between the National Football League ("NFL") and companies throughout the United States. I make this affidavit in support of Defendants' Motion for Partial Summary Judgment based on personal knowledge, and I am competent to testify as to the matters stated herein.

2. I have overseen the Corporate Sponsorship Department at NFLP for the past eleven (11) years. I have worked in the area of corporate sponsorships and partnerships for seventeen (17) years and have negotiated hundreds of sponsorship contracts in the sports industry on behalf of NFLP.

3. While not always the case, in general, when the NFL enters into a national sponsorship agreement, the sponsor is granted, among many other rights, the right to display the logos of the NFL (e.g., the NFL shield, "AFC", "NFC"), as well as the individual logos of every member club of the NFL ("Member Club"). Thus, the ability of a sponsor to use one logo of one particular Member Club is an extremely small portion of the sponsorship package.

4. In my experience marketing, structuring and negotiating sponsorship arrangements, I have never known the appearance or design of one logo of one NFL Member Club to factor into a company's decision to become or remain a sponsor. Indeed, many sponsors enter into sponsorship relationships with the NFL without knowing in advance what some or all of the NFL or Member Club logos look like. No sponsor or potential sponsor has ever bargained for the right to terminate a sponsorship or reduce its rights fee in the event of a change in the design or appearance of a team logo. Potential sponsors are comfortable that NFL and Member Club logos will more than satisfy a minimum standard of acceptability in terms of design and appearance.

5. I have never marketed a sponsorship based on the appearance of the logos of the NFL or its Member Clubs, because the creative aspects of a particular logo

are not a selling point to prospective sponsors. In my long experience in the sponsorship field, I have never seen the creative elements of a particular logo have any impact on the number of sponsorships entered into by NFLP, or the revenue generated by NFLP from sponsorships. This fact has been reinforced by the fact that eight (8) NFL Member Clubs (New England Patriots, Philadelphia Eagles, Cleveland Browns-Baltimore Ravens, Denver Broncos, Tampa Bay Buccaneers, New York Jets, Tennessee Oilers-Tennessee Titans and New York Giants) have significantly changed their logo system over the past seven (7) years and none of these changes has affected the revenue received by NFLP for its sponsorship packages. While I am aware that one or more of NFLP's sponsorship partners have confirmed this view in accompanying affidavits, I am certain that, if required by the Court, all of our sponsorship partners would similarly confirm this view.

6. The Baltimore Ravens "winged shield logo" presents a good illustration of this point. In 1996, the Cleveland Browns moved to Baltimore and became the Baltimore Ravens. Consequently, NFLP's sponsor package changed that year as well, in that the team previously known as the Cleveland Browns changed its name to the Baltimore Ravens and substituted the winged shield logo for the Cleveland Browns logo (which, notably, consisted of a plain orange helmet) for use in connection with that team. This change of logos caused no noticeable change in sponsorship business for NFLP. The change elicited no substantive sponsor comment and was not cited by any sponsor as the reason for becoming or remaining a sponsor that year. Similarly, in 1999, when the Baltimore Ravens discontinued use of the winged shield logo, there was no noticeable change in

sponsorship business for NFLP. That change led to no renegotiation of sponsorship agreements and contributed to no loss of sponsors by NFLP. In fact, sponsorship revenue increased in 1999 compared to 1998.

7. Based on my experience marketing, structuring and negotiating sponsorship deals, the true value of the sponsorship to a sponsor is the opportunity for the sponsor to associate its business with the NFL brand of professional football. Such an association allows the sponsor to reach the NFL's large and desirable fan base and to be connected with the most popular spectator sport in the United States. When I market sponsorship opportunities to major corporations, it is this opportunity to publicly associate with high quality professional football that drives the deal and serves as the selling point.

Dated: New York, New York
June 21, 2001

/s/ James Schwebel

Sworn to before me this
21st day of June, 2001

/s/ David M. Proper
Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION
Civil Action
No. MJG-97-1470

FREDERICK E. BOUCHAT,

Plaintiff,

v.

BALTIMORE RAVENS, INC. and NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.,

Defendants.

AFFIDAVIT OF MILLER BREWING COMPANY

STATE OF WISCONSIN)
: ss.:
COUNTY OF MILWAUKEE)

Michael Welsh, being duly sworn, deposes and says:

1. I am the Director of Events Marketing at Miller Brewing Company ("Miller"). My company is a national corporate sponsor of the National Football League ("NFL"). I make this affidavit in support of Defendants' Motion for Partial Summary Judgment based on personal knowledge, and I am competent to testify as to the matters stated herein.

2. My responsibilities include negotiating sponsorship arrangements between Miller and potential corporate partners. I have held this responsibility since 1994, and I have negotiated agreements with the NFL for sponsorship by Miller since that time.

3. Under Miller's agreement with National Football League Properties, Inc.("NFLP"), Miller has obtained, among others, the designation Official Beer Sponsor of the NFL Miller's sponsorship program includes a variety of rights, including the right to use the marks NATIONAL FOOTBALL LEAGUE, NFL, the NFL Shield, AFC, NFC, SUPER BOWL, PRO BOWL, and the right to display the logos of the NFL and each one of its member clubs ("Member Club").

4. The NFL sponsorship is attractive and valuable to Miller because of the high quality of the NFL's on-field product, the league's illustrious history, the popularity of professional football, and NFLP's marketing and promotion expertise. Further, the NFL and its Member Clubs have a large and passionate fan base that will favor products affiliated with NFL sponsors and, through its sponsorship, Miller seeks to increase its sales by appealing to this fan base. The opportunity to affiliate itself with this total package is what caused Miller to become and remain a national sponsor of the NFL

5. The value to Miller of its NFL sponsorship is not derived from the creative elements of any one Member Club logo. Miller first became an NFL sponsor in the early 1980s. The appearance or design of any single Member Club logo was not a factor in seeking an NFL sponsorship. In my experience negotiating ongoing

sponsorship agreements with NFLP on behalf of Miller, the appearance or design of any one logo of any one NFL Member Club has never factored into Miller's decision to remain a sponsor. Miller has never negotiated for the right to withdraw as a sponsor in the event of a logo change by one of the Member Clubs. There have been numerous logo changes in the NFL during the period of Miller's NFL sponsorship. These changes are irrelevant to Miller's sponsorship and business decisions and, in fact, these changes have grown to be expected.

6. Miller has been an NFL sponsor since before introduction of the Baltimore Ravens "winged shield logo" in 1996. The inclusion of the winged shield logo in NFLP's sponsor package that year had no impact on Miller's decision to remain a sponsor subsequently. During the period when the winged shield logo was in use by the Baltimore Ravens, at no time did Miller consider the value of its sponsorship package enhanced by the creative elements of the logo. In 1999, when the Baltimore Ravens discontinued use of the winged shield logo, Miller did not consider the value of its sponsorship package diminished by such discontinuance. At no time since 1998 did Miller consider withdrawing from or re-negotiating its sponsorship arrangement with NFLP due to any changes in the logos of the Baltimore Ravens.

Dated: New York, New York
June 18, 2001

Miller Brewing Company

By:/s/Michael Welch

Sworn to before me this
18th day of June, 2001
Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Civil Action No. MJG-97-1470

FREDERICK E. BOUCHAT,
Plaintiff,

v.

BALTIMORE RAVENS, INC. and
NATIONAL FOOTBALL LEAGUE
PROPERTIES, INC.,
Defendants.

AFFIDAVIT OF ESPN, INC.

STATE OF NEW YORK)
: ss.:
COUNTY OF MANHATTAN)

John Wildhack, being duly sworn, deposes and says:

1. I am the Senior Vice President, Programming, at ESPN, Inc. ("ESPN"). ESPN holds the exclusive rights to broadcast Sunday night games of the National Football League ("NFL") each season. I make this affidavit in support of Defendants' Motion for Partial Summary Judgment based on personal knowledge, and I am competent to testify as to the matters stated herein.

2. My responsibility includes negotiating broadcast rights agreements with sports leagues and other operators of sporting events. I have held my

current responsibility since September, 1994, and I was involved in the negotiation of ESPN's current broadcast rights contract with the NFL.

3. The current broadcast rights agreement between the NFL and ESPN was entered into in 1997. However, ESPN has held broadcast rights in the NFL properties for many years prior to 1997. In no way did the appearance or design of any one logo of any one of the NFL's teams (the 'Member Clubs') impact ESPN's decision to bid on the broadcast rights for NFL games, or the amount of the bid entered by ESPN for such rights. In my experience, I have never known the appearance or design of a team logo to factor into ESPN's, or any other broadcast company's, decisions regarding the negotiation of a broadcast rights agreement. I have never known the creative aspects of a particular logo to be a selling point for ESPN or any other broadcast company considering a broadcast rights deal with a sports league.

4. In 1996, I understood that the Cleveland Browns moved to Baltimore, became the Baltimore Ravens, and began using the "winged shield" logo. The change of logos from the plain orange helmet of the Cleveland Browns to the winged shield logo was insignificant with regard to ESPN's view of the value of its broadcast rights. The Baltimore Ravens's discontinuance of use of the winged shield logo in 1998 was similarly insignificant to ESPN's view of the value of its broadcast rights. ESPN did not seek to broadcast either more or fewer Baltimore Ravens games during the 1999 season because of the logo change. At no time after 1998 did ESPN consider re-negotiating its broadcast rights agreement because of the logo change.

5. At no time during the 1996 season did ESPN experience any increase in ratings for its broadcasts of Sunday night NFL games that I believe is attributable to the Ravens's adoption of the winged shield logo. There was no increase in the average rating for games featuring the Baltimore Ravens in 1996 over the average rating for games featuring the Cleveland Browns in 1995 (in fact, there was a significant decrease). During the 1999 season, after the Ravens discontinued use of the winged shield logo, there was no decrease in the average rating for games featuring the Ravens, compared to the average rating for Ravens games in 1998.

6. The value to ESPN of its broadcast rights agreement with the NFL is not derived from the creative elements of any one Member Club logo. ESPN is famous for its broadcasts of high quality sports programming. NFL professional football games are among the most popular and high quality sporting events. These factors, among others, are what drive ESPN to seek the rights to broadcast NFL games. The consistently large audiences attracted by such high quality sporting events, and ESPN's association with the NFL, allow ESPN to offer advertising to its customers at favorable rates. Such rates, and the accompanying revenue, have no connection to the appearance or design of any team's logo.

Dated: New York, New York
June 21, 2001

ESPN, Inc.
By /s/ John Wildhack
Senior Vice President, Programming

Sworn to before me this 21st day of June, 2001
Notary Public

RAVENS
© Trish Bunchist
Dec 5-1995

Fred Bouchet.
PHONE #
685-1098
PLEASE CONTACT
ME IF HE USES IT
WORK NUMBER.
333-2780 ORIGIN
THANK YOU.

TO MR JOHN MOAG
I WOULD LIKE YOU TO SEND THIS TO MR MOAG AND SEE IF HE WOULD LIKE THIS DESIGN
© Fred Bouchet IF HE does DEC 5 1995 USE IT I WOULD LIKE A LETTER OF RECOGNITION AND IF THE TEAM HE WANTS TO I WOULD LIKE A AUTOGRAPH

(2)

Supreme Court, U.S.
FILED
MAR 12 2004
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No. 03-1291

IN THE

Supreme Court of the United States

FREDERICK E. BOUCHAT,

Petitioner,

v.

BALTIMORE RAVENS, INC. and
NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Whether Section 504(b) of the Copyright Act prohibits a defendant from ever obtaining summary judgment on a claim for profits, even where the plaintiff has failed to raise a genuine issue of material fact that any such profits were attributable to plaintiff's copyrighted work?

2. Whether, under Section 504(b) of the Copyright Act, the District Court abused its discretion by instructing the jury that Defendants were required to prove that their profits were attributable to factors other than their use of the copyrighted work and that Defendants carried the burden of proof throughout the entire damages phase of the proceeding?

---

1. Pursuant to Supreme Court Rule 15, because Defendants believe that the Petition mischaracterizes the questions presented, Defendants submit a formulation that more accurately describes the issues Plaintiff raises in this Court.

STATEMENT PURSUANT TO RULE 29.6

Respondent National Football League Properties, Inc. (now named NFL Properties LLC) states that its parent corporation is NFL Enterprises LP, and no publicly held company owns 10% or more of the stock of NFL Properties LLC.

Respondent Baltimore Ravens, Inc. states that it has no parent corporation, and that no publicly held company owns 10% or more of its stock.

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U.S. Sup. Ct. R. 10 13

Defendants Baltimore Ravens, Inc. ("Ravens") and National Football League Properties, Inc. ("NFLP" and, collectively with the Ravens, "Defendants") respectfully submit this response to plaintiff Frederick E. Bouchat's ("Plaintiff") Petition for Writ of Certiorari ("Petition").[1]

REFERENCE TO OPINIONS BELOW

Defendants concur with Plaintiff's citation of the opinions below with the following exceptions: the decision of the United States Court of Appeals for the Fourth Circuit, reported as *Bouchat* v. *Baltimore Ravens Football Club, Inc.*, 346 F.3d 514 (4th Cir. 2003) (Pet. App. 1a-31a), was not a "split" decision. Rather, the panel, consisting of Judges Wilkinson, King, and Widener, unanimously affirmed the District Court's summary judgment, pretrial and trial rulings. Judge Widener's dissent was limited to the issue of one of the trial court's jury instructions concerning the apportionment of profits. Defendants also refer this Court to the denial of Plaintiff's Petition for Rehearing *en banc* by a vote of 11-1 (with one recusal). (Pet. App. 113a-114a.)

STATUTE AND RULES INVOLVED IN THE CASE

A. Title 17 U.S.C. § 504(b)

> (b) Actual damages and profits. The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that

are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

B. Fed. R. Civ. P. 56(b) and (c)

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

INTRODUCTION

Reduced to its essence, the Petition calls upon this Court to eliminate the gatekeeping role of the trial court through summary judgment whenever a plaintiff seeks defendants' profits under Section 504(b) of the Copyright Act. While Section 504(b) shifts the burden of proof to defendants, it clearly does not trump well-settled summary judgment jurisprudence and guarantee a copyright plaintiff that its claims for defendants' profits (no matter how weak) will automatically be decided by a jury.

This case turned on the evidence presented in the trial court and the proper application of well-established summary judgment principles, not on any legal controversy or conflict arising under the Copyright Act. Specifically, the District Court and the jury were faced with determining the amount of Plaintiff's claimed damages from the infringement of his copyrighted work. Plaintiff made a tactical decision not to seek statutory damages pursuant to Section 504(c) or any actual damages pursuant to the first sentence of Section 504(b). Instead, Plaintiff relied solely on a claim for a stake in Defendants' profits earned while the logo at issue (referred to by the parties as the "Flying B Logo") was in use.[2] Notwithstanding that Section 504(b) explicitly permits recovery only of profits "attributable to the infringement," Plaintiff claimed he was entitled to recover virtually every dollar earned by Defendants during the years they used the Flying B Logo. Thus, Defendants filed motions for partial summary judgment seeking to exclude revenue sources that were unrelated to Defendants' use of the logo – for instance, revenue from stadium parking, game broadcasts and ticket sales.

2. 17 U.S.C. § 504(b).

In response, instead of submitting evidence creating a genuine issue of fact for trial, Plaintiff argued, as here, that, even if there was no issue of fact for the jury to determine, he was automatically entitled to present such claims to a jury pursuant to the presumption afforded to him by Section 504(b). The Fourth Circuit and the District Court, relying on long-established principles of summary judgment and applicable Section 504(b) jurisprudence, granted Defendants' summary judgment motions as to certain revenue streams presenting either (i) no conceivable connection to the logo at issue; or (ii) no genuine issue of material fact as to any connection to the logo. It is this most basic and well-settled role of the trial court as a gatekeeper against factually unsupported claims not worthy of jury consideration of which Plaintiff seeks review here.

Plaintiff claims that the Fourth Circuit's holding that a copyright plaintiff must show a conceivable connection between the infringement and the revenue claimed is contrary to this Court's precedent and in conflict with other Circuits. To the contrary, that holding is in accord with precedent of this Court and all other Circuit Courts that have addressed this issue. *See, e.g.*, *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940) (copyright plaintiff only entitled to profits attributable to copyrighted work); *On Davis* v. *The Gap, Inc.*, 246 F.3d 152, 160 (2d Cir. 2001) (gross revenue under Section 504(b) means gross revenue attributable to the infringement); *Taylor* v. *Meirick*, 712 F.2d 1112, 1122 (7th Cir. 1983) ("If General Motors were to steal your copyright and put it in a sales brochure, you could not just put a copy of General Motor's corporate income tax return in the record and rest your case for an award of infringer's profits."); *Andreas* v. *Volkswagen of Am., Inc.*, 336 F.3d 789 (8th Cir. 2003) (plaintiff must show nexus between

infringement and revenue claimed); *Mackie* v. *Rieser*, 296 F.3d 909, 914-16 (9th Cir. 2002), *cert. denied*, 537 U.S. 1189 (2003) (plaintiff must show causal connection between infringing act and revenue claimed); *Univ. of Colo. Found., Inc.* v. *Am. Cyanamid Co.*, 196 F.3d 1366, 1375 (Fed. Cir. 1999) (plaintiff has the burden to demonstrate a nexus between the infringement and the indirect profits before apportionment can occur). Accordingly, there is no inconsistent application of copyright law among the Circuits warranting review by this Court.

To the extent there is any question, the trial court's summary judgment rulings were proved correct by the jury decision. As to all revenue streams presenting a triable issue of fact, the jury found that Defendants had proven by a preponderance of the evidence that all of the revenue generated from those revenue streams (a total sum of over two and one half million dollars) was attributable to factors other than the copyright value of the Flying B Logo. Like Plaintiff's failures at the summary judgment stage, this verdict had everything to do with the evidence.

While Defendants submitted abundant evidence, consistent with common sense and experience, that a fan purchases his or her team's merchandise for myriad reasons other than the artwork of the team's logo (such as team loyalty, on-field performance and the team's and league's goodwill), Plaintiff submitted virtually no evidence in support of his claims, relying (as at summary judgment) almost entirely on the fact that the Defendants bore the burden of proving which of its profits conceivably connected to the logo were in fact attributable to other factors. Under these actual trial conditions, the verdict is hardly surprising.

Finally, Plaintiff does not even attempt to present any compelling reason why this Court should review the jury charges. The Fourth Circuit properly held that the District Court clearly instructed the jury multiple times during the trial that Defendants bore the burden of proof throughout the trial. Plaintiff simply has failed to identify a conflict in the Circuits, a conflict with this Court's precedent, or any other basis that would merit review of the jury instructions by this Court. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

A. Liability Phase: One of Three Claims Survives

Plaintiff commenced this action seeking $10,000,000 in damages in the District Court of Maryland, alleging that NFLP and the Ravens had infringed his copyright in three different drawings. The District Court bifurcated the liability and damages phases of the trial. The liability trial resulted in a verdict that NFLP and the Ravens were not liable for infringement of two of Plaintiff's drawings, but that a third drawing (the Flying B Logo drawing) was infringed by one of the Ravens' logos. On appeal, a divided panel of the Fourth Circuit affirmed the single verdict of infringement. *Bouchat* v. *Baltimore Ravens, Inc.*, 228 F.3d 489 (4th Cir. 2000). Plaintiff did not appeal from the two verdicts of non-infringement. A divided Fourth Circuit narrowly denied rehearing *en banc*, *Bouchat* v. *Baltimore Ravens, Inc.*, 241 F.3d 350, 365-66 (4th Cir. 2001) (with 5 judges voting for rehearing, 4 declining, and 1 abstaining), and this Court denied Defendants' petition for writ of *certiorari*. *Baltimore Ravens, Inc.* v. *Bouchat*, 532 U.S. 1038 (2001).

B. Damages Phase

Plaintiff pursued solely an award of Defendants' profits pursuant to Section 504(b) of the Copyright Act, failing to make a claim for actual or statutory damages. He steadfastly claimed that *all* of Defendants' profits during the period the logo was used were potentially recoverable by him, regardless of whether such profits were reasonably related to the Flying B Logo. For example, if a fan paid to park his car near a sign bearing the logo or bought a hot dog at a concession stand displaying the Flying B Logo while attending a game at Ravens Stadium, Plaintiff claimed that such revenue could be attributable to the Flying B Logo, and therefore such claim *must be* submitted to a jury. Thus, invoking the age-old mechanism of summary judgment in order to eliminate issues as to which there was no material factual dispute, NFLP and the Ravens moved for partial summary judgment to exclude revenue that bore no causal connection to the Flying B Logo.

1. Summary Judgment: The District Court Dismisses Plaintiff's Claims for Remote Revenue

In deciding Defendants' partial summary judgment motions, the District Court articulated the following principle:

> [A]ny profits attributable to the infringement, *i.e.*, attributable to the Defendants' use of the Shield Drawing to create the Flying B [L]ogo, would necessarily have to result from revenue generated *because of* the use of the Flying B [L]ogo. Revenues that were derived without regard to whether the Flying B logo was used could not be considered 'attributable to' the logo.

Bouchat v. *Baltimore Ravens, Inc.*, 215 F. Supp. 2d 611, 617 (D. Md. 2002) (Pet. App. 71a) (emphasis in original).

Plaintiff, however, despite numerous requests from the District Court and having had appropriate discovery, did not provide any rational explanation or evidence to show that the revenue was earned because of the presence of the logo. Thus, the District Court found that Plaintiff had advanced no "sensible argument . . . , much less evidence, that could support a conclusion that any . . . source of revenue [other than revenue generated from the sale of merchandise] could have been affected by the use of the Flying B [L]ogo." (Pet. App. 73a.)[3] Accordingly, the District Court – fulfilling its affirmative duty as gatekeeper – granted summary judgment dismissing profit claims as to all revenue streams except licensed merchandise and sponsorships. (Pet. App. 80a.)

Concerning sponsorship revenue, the District Court reserved ruling to permit Plaintiff further discovery. After additional discovery and further briefing failed to raise a genuine issue of material fact, the District Court supplemented its decision on summary judgment to eliminate sponsorship revenue from Plaintiff's potential pool of recovery on the same basis as that articulated in its prior decision. (Pet. App. 57a-62a.)

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3. Plaintiff cites the affidavit of Edwin Gold, a purported branding expert, as evidence ignored by the District Court. (Pet. at 5 n.1.) Gold's affidavit, however, focused exclusively on non-revenue generating activities and did not even attempt to causally connect Defendants' revenue to the work at issue. Indeed, Gold freely conceded that a logo's "primary and almost entire appeal to the public lies in its ability to permit a third party . . . to associate itself with the tremendous fame and goodwill of NFL football." (Pet. App. 170a.) In other words, it was the trademark (not the copyright) significance of the logo (to which Plaintiff contributed nothing) that drove revenues. Thus, Gold's testimony not only failed to support Plaintiff's argument of a causal connection between the logo and all revenue streams, it actually supported Defendants' argument that such revenue was attributable to factors other than the copyrighted art work.

Plaintiff then conducted additional document and deposition discovery of Defendants as to the remaining revenue. At the close of discovery, Defendants again moved for summary judgment to exclude certain other categories of remote revenue, such as revenue from video games and game programs, that were not attributable to the Flying B Logo. Though recognizing that Defendants shouldered the burden of proof, the District Court found that NFLP and the Ravens had produced unrebutted evidence establishing that such revenue was not attributable to the infringement. Although the District Court offered Plaintiff yet another opportunity to raise an issue of fact for trial, Plaintiff produced nothing else. Whereupon, the District Court found that Defendants had met their burden and granted partial summary judgment to Defendants. (Pet. App. 50a-51a.) Notwithstanding the District Court's grant of summary judgment, Plaintiff presented his claim to over two and a half million dollars in revenue from the sale of licensed merchandise to the jury at trial, as described *infra*.

2. Trial: The Jury Finds That the Remaining Profits Were Attributable Entirely to Factors Other Than the Flying B Logo

The parties proceeded to trial to determine the amount, if any, of Defendants' profits from licensed merchandise sales that were attributable to the logo or other factors. The amount of Defendants' profits was not in dispute so the trial focused exclusively on allocating between profits attributable to the Flying B Logo or other factors. To provide proper context, the District Court read an introductory statement to the jury drafted with considerable input from Plaintiff explaining that Plaintiff was the creator of the Flying B Logo, that he had certain rights with respect to the logo, and that Defendants

earned revenue from the sale of merchandise bearing the logo. (JA 560-70.) In addition, the District Court repeatedly instructed that Defendants bore and maintained the burden of proof. (JA 563-67.)

At trial, Defendants introduced evidence from each step of the revenue-generating process from executives in the licensing, manufacturing, and concessions industries, each of whom had considerable experience in the sales of licensed products bearing the trademarks of the NFL member clubs. At the consumer level, Defendants presented survey evidence and expert testimony showing that the Flying B Logo had no impact on Ravens merchandise sales because merchandise bearing any Ravens logo, or even just the name Baltimore Ravens, would sell equally as well.

In sharp contrast, Plaintiff failed to present *any* affirmative evidence at trial, relying instead entirely on the gambit that the jury would award him a significant percentage of the profits since it was Defendants' burden to prove that profits were attributable to factors other than the logo artwork. His direct case consisted solely of stating Defendants' gross revenue (which was not disputed), and showing the jury various items of Ravens' licensed merchandise bearing the Flying B Logo. The only witness Plaintiff called at trial was an expert witness called solely to rebut Defendants' expert and survey.

After the close of evidence, as before, the District Court repeatedly instructed the jury that Defendants bore the burden of proof. (JA 902-03; 908-14.) The simple three-question verdict form asked the jury to decide whether Defendants had proven by a preponderance of the evidence that revenue generated from the sale of merchandise bearing the Flying B Logo was attributable entirely to factors other than

Defendants' use of the logo, and if not, what percentage of such revenue Defendants' had proven was attributable to other factors. (Pet. App. 118a-120a.) After a full day of deliberations, the jury found that Defendants had carried their burden and demonstrated that all profits from these merchandise sales were attributable completely to factors other than the Flying B Logo. (Pet. App. 118a.) Following the verdict, judgment was entered by the District Court "determining that Plaintiff is not entitled to any monetary recovery from Defendants." (Pet. App. 47a-48a.)

C. The Fourth Circuit Affirms Given Plaintiff's Failure of Proof

On appeal, Plaintiff asserted that the District Court (1) erred in awarding partial summary judgment excluding revenue unrelated to Defendants' use of the logo, (2) abused its discretion by excluding prejudicial evidence,[4] and (3) abused its discretion by failing to make clear in its instructions that Defendants bore the burden of proving that their profits were not attributable to the infringement.

The Fourth Circuit first held that certain revenue streams lacked any conceivable connection to the Flying B Logo, and thus were properly excluded.[5] (Pet. App. 18a-19a.) With respect to certain revenue streams that did bear a conceivable connection ("Remote Revenue"),[6] the Fourth Circuit found

4. Plaintiff has abandoned this claim, which the Fourth Circuit unanimously rejected. (Pet. App. 25a n.12.)

5. The revenue streams excluded on this basis were free merchandise and minimum shortfall guarantee payments. (Pet. App. 18a.) Plaintiff no longer contests the exclusion of these revenue streams from his potential pool of recovery. (Pet. at 14 n.5.)

6. The streams of revenue excluded on this basis included Defendants' non-merchandise revenue and revenue from trading cards, video games, or game programs. (Pet. App. 20a.)

that although Defendants bore the burden of proof, they had presented sufficient evidence to show there were no issues of fact in dispute, and thus Plaintiff was required to demonstrate the existence of a material issue of fact that would forestall summary judgment. (Pet. App. 21a-23a.) Observing that Plaintiff "declined to respond to the summary judgment motions with any evidence at all, resting instead on his initial, and sole, evidentiary proffer: the total receipts generated by all NFLP and Ravens activities," the Fourth Circuit *unanimously* concluded that the District Court properly entered summary judgment in favor of Defendants with respect to the Remote Revenue. (Pet. App. 21a-22a.)

With respect to the District Court's jury instructions, a majority of the Panel (Judges Wilkinson and King) concluded that the District Court did not abuse its discretion because "the court made it eminently clear" to the jury "that the Ravens bore the burden of proof in the damages trial." (Pet. App. 24a.) The majority noted that the District Court properly instructed the jury on at least four separate occasions that Defendants bore the burden of proof. *Id.* Accordingly, the District Court's instructions "plainly informed the jury of the controlling legal principles." (Pet. App. 25a.) Judge Widener dissented on the sole basis that "the court never instructed the jury that they must presume all profits are attributable to the infringement unless the defendants prove otherwise." (Pet. App. 28a.) Notably, however, Judge Widener "agree[d] with the majority's conclusion that the district court correctly instructed the jury on the burden of proof." *Id.*

After the issuance of the Fourth Circuit's opinion, Plaintiff submitted a Petition for Rehearing *en banc* claiming, *inter alia*, that there was a split among the Circuits regarding the proper interpretation of Section 504(b) and that the jury

instructions issued by the District Court failed to comport with Fourth Circuit precedent. The Petition for Rehearing *en banc* was denied with only one Judge voting in favor of rehearing (Judge Widener) and the remaining 11 Judges voting against (one Judge recused herself). (Pet. App. 113a-114a.)

REASONS FOR DENYING THE PETITION

The Fourth Circuit's decision here is not in conflict with the decisions of other Circuits or with past rulings of this Court, but is instead firmly grounded on the precedent of this Court, common sense, and the "basic tenets of Rule 56 jurisprudence." (Pet. App. 11a.) Plaintiff's suggestion that summary judgment cannot be applied to a profits claim under Section 504(b) is directly contrary to the consensus decisions of this Court and the Circuit Courts, defies common sense, and would strip the trial courts of their traditional role as gatekeeper.

Moreover, the Fourth Circuit properly stated the existing rule of law relating to the apportionment of profits under Section 504(b), holding that the burden of proof remains squarely on the infringer. (Pet. App. 17a-18a.) As such, any error asserted by Plaintiff based on the Fourth Circuit's affirmation of the District Court's decision could only be based on a misapplication of a properly stated rule of law, a factor which weighs heavily against granting Plaintiff's Petition. Sup. Ct. R. 10.

A. The Fourth Circuit's Ruling on Summary Judgment is Consistent With the Law of Other Circuits

Plaintiff argues that the Fourth Circuit's decision is in conflict with both the Eighth Circuit's decision in *Andreas*, 336 F.3d 789, and the Ninth Circuit's decision in *Mackie*, 296 F.3d 909, as it purportedly requires a copyright owner to "prove that the infringing use caused an increase in the infringer's revenue," contrary to the plain meaning of Section 504(b). (Pet. at 12.) Plaintiff's argument is fundamentally flawed in three critical respects. First, there is no conflict in the Circuits, as each Circuit requires that a copyright owner establish a nexus between the gross revenue claimed and the infringing acts before he is entitled to collect profits pursuant to Section 504(b). Second, Plaintiff fails to recognize that the differing results in *Mackie*, *Andreas*, and *Bouchat* were driven by the evidence, not by a conflict of law between the Circuits. Third, Plaintiff's argument that Section 504(b) is a "statutory attribution" mandating a trial by jury under all circumstances fails to recognize that the presumption afforded by Section 504(b), by its nature, is rebuttable. As such, this presumption can be overcome by a properly supported motion for summary judgment. Plaintiff simply ignores his own failure to respond to Defendants' motion for summary judgment with any evidence or even logical argument sufficient to raise a genuine issue of material fact. (Pet. App. 21a-23a.) In sum, Plaintiff's claim that a jury *must* decide the amount of profit attributable to every revenue stream claimed by a copyright plaintiff would effectively prevent a District Court from *ever* using Fed. R. Civ. P. 56 to isolate and dispose of factually unsupported claims for profits asserted under Section 504(b) of the Copyright Act. Such a result would be contrary to the jurisprudence of this Court and the Circuit Courts, authorize the waste of judicial

resources, and improperly rewrite the plain language of the Copyright Act contrary to Congressional intent. Accordingly, the Petition should be denied.

1. The Circuit Courts Interpret Section 504(b) Uniformly and Consistent With the Plain Language of the Statute to Require a Copyright Owner to Establish a Nexus Between the Infringement and the Revenue Claimed

The Fourth Circuit's holding requiring Plaintiff to establish a "conceivable connection" between the revenue claimed and Defendants' use of the Flying B Logo is consistent with both the plain language of Section 504(b) of the Copyright Act and the precedent of other Circuit Courts.

As in any case of statutory construction, the analysis begins with the plain language of the statute. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999). Section 504(b) provides in relevant part:

> The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are *attributable to the infringement* and are not taken into account in computing the actual damages.

17 U.S.C. § 504(b) (emphasis added). The statute explicitly states that a copyright owner is only entitled to recover profits that are "attributable to" the infringement. Thus, requiring a copyright plaintiff to establish a nexus or connection between the revenue he claims and the infringed work is entirely consistent with the statute's plain language.

Courts have consistently interpreted Section 504(b) in accordance with the plain language of the statute. The Fourth Circuit has long recognized that there are cases where not all of a copyright defendant's revenue streams are connected to the infringement. *Konor Enters., Inc.* v. *Eagle Publ'ns, Inc.*, 878 F.2d 138, 140 (4th Cir. 1989). In such cases, the Fourth Circuit has consistently held that it is appropriate for the trial court, as a matter of law, to exclude revenue unrelated to the infringing activity from the copyright plaintiff's potential pool of recovery. *Walker* v. *Forbes, Inc.*, 28 F.3d 409, 412-14 (4th Cir. 1994) (affirming district court's exclusion of advertising and subscription revenue prior to trial as a matter of law).

Other Circuits that have addressed this issue are in accord. For example, the Second Circuit has held that the term "infringer's gross revenue," as used in Section 504(b), should not be construed so broadly as to include revenue from lines of business that were unrelated to the act of infringement. *On Davis*, 246 F.3d at 160 (gross revenue under Section 504(b) means gross revenue attributable to the infringement). In cases where it is clear that not all profits are attributable to the infringement, it is not enough simply to show infringement and then seek all of the defendant's profits from whatever source. *Taylor*, 712 F.2d at 1122 (noting that "if General Motors were to steal your copyright and put it in a sales brochure, you could not just put a copy of General Motors' corporate income tax return in the record and rest your case for an award of infringer's profits"). Rather, copyright law decisions uniformly require that the plaintiff bears the burden of establishing a nexus between the infringement and the revenue claimed. *See, e.g.*, *Mackie*, 296 F.3d at 915 (plaintiff must establish a "sufficient causal link" between the infringement and the profits he seeks); *Andreas*,

336 F.3d at 799 (plaintiff must show nexus between revenue claimed and infringement); *Univ. of Colo. Found.*, 196 F.3d at 1375 (plaintiff has the burden to demonstrate a nexus between the infringement and certain profits before apportionment can occur). As such, the Fourth Circuit's interpretation of Section 504(b) is plainly consistent with the interpretations of Section 504(b) rendered by its sister Circuits and there is no conflict among the Circuits concerning the statutory formula for apportioning profits thereunder.

Plaintiff's claim that traditional tort principles of causation should not apply to Section 504(b) because that would encourage "efficient infringement" is misguided. (Pet. at 17.) In *Walker*, the case cited by Plaintiff in support of this argument, the Fourth Circuit merely noted that tort law is not strictly adhered to in one limited aspect of copyright law; that is, a plaintiff is permitted to recover a defendant's revenue even if it would result in a windfall to plaintiff, thus discouraging cases of "efficient infringement." *Walker*, 28 F.3d at 412. There is nothing in *Walker* even remotely suggesting that a copyright plaintiff can recover profits that are entirely unrelated to the infringement or that traditional summary judgment standards should not apply. [7]

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7. Moreover, this argument defies common sense. The remedies available under the Copyright Act (claims for profits, actual damages, statutory damages and attorneys fees), coupled with the burdens associated with litigation (including litigation expenses and the waste of management resources), provide substantial in *terrorem* effect to discourage infringement. The result in this case, as discussed throughout this submission and as determined by both the District Court and the Fourth Circuit, turned on nothing more than a failure of proof.

Moreover, Plaintiff's argument is contrary to this Court's express recognition that a copyright plaintiff is not entitled to recover any profits that are attributable to the goodwill and efforts of defendants. *See, e.g., Sheldon*, 309 U.S. at 408 ("Equity is concerned with making a fair apportionment so that neither party will have what justly belongs to the other.") In *Sheldon*, which involved the defendants' unauthorized use of plaintiff's screenplay in the creation of a motion picture, this Court held that the profits from defendants' motion picture derived primarily from "the talent and popularity of the [ ] stars . . . the artistic conceptions, and in the expert supervision and direction of the various processes which made possible the composite result with its attractiveness to the public." *Id.* at 407. Plaintiff argues that the Fourth Circuit's decision is somehow unfair because it would allow a star like Madonna to argue that, "regardless of whose song she might have sung, she would have generated the same revenues." (Pet. at 18.) However, that is precisely the argument that this Court in *Sheldon* countenanced – that it is Madonna's "star power" that drives consumers to purchase her music rather than any hypothetically infringed lyrics.[8] It is not difficult to envision that a plaintiff suing Madonna for infringement of song lyrics would argue that there is a conceivable connection between a consumer's desire to purchase a song and the creativity of the lyrics. In that case, a jury determination of the amount of the contribution would be appropriate. Here, however, the District Court merely

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8. Plaintiff's reliance on *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239 (1903) is misplaced. In *Bleistein*, the Court held that chromolithographs used in connection with circus advertisements were subject to copyright protection. *Id.* at 252. The issue in *Bleistein* was whether the works at issue were proper subjects of copyright protection, not whether there was a causal connection between the use of the work and the defendant's profits.

concluded that Plaintiff failed to offer a plausible connection between certain revenue streams, such as stadium parking, and the infringed logo and that summary judgment was, therefore, appropriate. To complete the picture, the hypothetical lyricist whose work is infringed by Madonna can also seek to recover actual damages and statutory damages, remedies which plaintiff declined to seek at trial. The Copyright Act's damages provisions, in combination, operate to fully protect those artists who prove that their works are worthy of protection. Plaintiff's failure to seek certain types of damages and failure to offer sufficient evidence to support his claim to profits does not justify an entirely new – and unsupportable – interpretation of the Copyright Act.

2. The Fourth Circuit's Decision Is in Accord With Eighth and Ninth Circuit Jurisprudence

Plaintiff's claim that the Fourth Circuit's decision here conflicts with the Eighth Circuit's ruling in *Andreas* or the Ninth Circuit's ruling in *Mackie* is simply unfounded. Both *Andreas* and *Mackie* expressly recognize that before a copyright owner can recover profits under Section 504(b), the copyright owner must "first establish some connection or relationship between the infringement and the profits he seeks." *Andreas*, 336 F.3d at 799; *Mackie*, 296 F.3d at 914. Thereafter, as here, the respective results were driven by the evidence.

In *Mackie*, the Ninth Circuit found that the copyright owner failed to present "any non-speculative evidence that would even suggest a link" to the infringement and thus affirmed the District Court's decision to grant summary judgment in favor of defendant. *Mackie*, 296 F.3d at 916

("[W]e conclude that Mackie has not proffered non-speculative evidence that is sufficient to create a triable issue of fact.") In *Andreas*, the Eighth Circuit distinguished *Mackie* on the facts, noting in particular that Plaintiff introduced evidence showing that the infringing commercials received high ratings on surveys that assessed consumer recall of the commercials and that defendant Audi paid a substantial bonus based on the success of the commercials. *Andreas*, 336 F.3d at 797. The Eighth Circuit concluded therefore that plaintiff had presented sufficient evidence of a nexus between the infringing acts and the revenue claimed to support the jury's verdict in that case. *Id.* Thus, there is not a conflict among the Eighth and Ninth Circuits as to the meaning of Section 504(b).

The *Bouchat* decision is in accord with both *Mackie* and *Andreas*. As to certain lines of revenue (revenue attributable to so-called free merchandise and minimum guarantee shortfall payments), the Fourth Circuit found that there was no "conceivable connection" between Defendants' use of the logo and the profits claimed by Plaintiff.[9] (Pet. App. 20a.) Otherwise put, the Fourth Circuit affirmed the District Court's decision to exclude revenue attributable to free merchandise and minimum guarantee shortfall payments from Plaintiff's potential pool of recovery because there was no nexus between such revenue and the Defendants' use of the infringing work. *See, e.g.*, *Andreas*, 336 F.3d at 796, and *Mackie*, 296 F.3d at 915. Plaintiff apparently does not contest this ruling. (Pet. at 14 n.5.) Plaintiff only appears to contest

9. Specifically, the Fourth Circuit observed that "[t]he levels of each licensee's minimum guarantee and free merchandise obligation were established, *ex ante*, by the terms of the licensee's contract with NFLP; neither figure could fluctuate in response to consumer behavior." (Pet. App. 19a.)

the remainder of the trial court's summary judgment rulings which dealt with Plaintiff's failure to raise a genuine issue of material fact, an issue that clearly was not addressed in *Andreas* or *Mackie*. Yet in ruling on these issues, the trial court merely applied settled summary judgment principles in accord with its affirmative obligation to prevent factually unsupported claims from proceeding to trial. (Pet. App. 23a); *Sibley* v. *Lutheran Hosp. of Md., Inc.*, 871 F.2d 479, 483 (4th Cir. 1989).

Plaintiff's attempt to argue that there is conflict among *Andreas*, *Mackie*, and *Bouchat* based on the treatment of indirect profits under Section 504(b) is a red herring. (Pet. at 12.) The Fourth Circuit did not ground its decision on a categorization of profits as "direct" or "indirect." Instead, the Fourth Circuit addressed the summary judgment issues in a two-step process, first considering whether there was a conceivable connection or nexus between the revenue claimed and the profits at issue and, if so, whether there was a genuine issue of material fact with respect to Plaintiff's claim to such revenue. (Pet. App. 18a.) Accordingly, *Bouchat* did not turn on whether the revenue at issue was "direct" or "indirect," but rather the failure of Plaintiff to present any evidence to raise a genuine issue of material fact as to certain lines of Defendants' profits. In so doing, the Fourth Circuit correctly noted that the Ninth Circuit's decision in *Mackie* fully comported with the Fourth Circuit's "summary judgment jurisprudence". (Pet. App. 14a.) Thus, the Fourth Circuit did not "expand," contrary to Plaintiff's argument, the Ninth Circuit's holding in *Mackie* to direct profits. (Pet. at 13.) Rather, the Fourth Circuit merely applied traditional summary judgment rules in the copyright context.

Plaintiff's claim that the Fourth Circuit's decision apportioned "all commercial value in favor of Respondents as a matter of law" is likewise unsupported.[10] (Pet. at 18.) As to revenue attributable to sales of licensed merchandise, Plaintiff did indeed present his claim to a jury, arguing that his artwork had some commercial impact on the sale of merchandise bearing the subject logo created by Plaintiff. Having submitted no evidence to support this claim, it is not surprising that the jury ultimately rejected it; Plaintiff cannot complain, however, that he did not have an opportunity to present his case to a jury.

In any event, neither the District Court nor the Fourth Circuit ruled that the Flying B Logo lacked commercial value. Rather, the rulings were based on Plaintiff's failure to present *any* evidence showing a connection between certain streams of revenue that he claimed and the Flying B Logo. (Pet. App. 79a.) These well-reasoned rulings were based on long-standing legal principles and were consistent with the findings of a unanimous jury. As such, Plaintiff's claim that the District Court held as a matter of law that Plaintiff's work had no commercial value is baseless.

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10. Plaintiff's reliance on *Harper & Row, Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539 (1985) does not support his claim. *Harper & Row* involved whether a magazine's unauthorized publication of verbatim quotes from President Ford's memoirs constituted fair use – an issue not even remotely connected to this proceeding. The language cited by Plaintiff refers to the Court's analysis of the third fair use factor, not to any damages issue. Further, Plaintiff's cause is not supported by *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917). The issue in *Herbert* was whether the performance of a copyrighted musical composition in a restaurant without charging for admission constituted an infringement. The Court did not consider the extent to which the copyrighted musical composition contributed to defendant's profits. *Id.* at 593.

3. The Fourth Circuit's Decision Properly Recognized Section 504(b)'s Rebuttable Presumption

The Fourth Circuit's ruling that Section 504(b) creates an "initial presumption" in favor of the successful copyright plaintiff does not conflict with existing case law. (Pet. at 14.) Even the cases cited by Plaintiff recognize that the presumption created by Section 504(b) is "rebuttable," and thus the defendant may overcome this presumption by producing evidence of a lack of a causal connection between the revenue and the work at issue.[11] (Pet. at 3); *see, e.g.*, (Pet. App. 29a) (Widener, J. dissenting) (presumption in Section 504(b) is "rebuttable"); *Andreas*, 336 F.3d at 796 (citing with approval District Court finding that Section 504(b) creates a "rebuttable presumption"). The Fourth Circuit's ruling makes good sense – interpreting Section 504(b)'s presumption as permanent or conclusive, as Plaintiff suggests, would strip the District Court of its crucial function as a gatekeeper against the trial of baseless claims.[12]

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11. Plaintiff's claim that the word "only" as used in Section 504(b) automatically creates an issue of fact for the jury is untenable. (Pet. at 17.) The term gross revenue as used within Section 504(b) means gross revenue attributable to the infringement. *On Davis*, 246 F.3d at 160.

12. Such an "initial presumption" is consistent with the notion that Section 504(b) shifts the burden of proof from a successful copyright plaintiff to the defendant to show that the defendant's profits are not attributable to the infringement. Indeed, the Fourth Circuit properly noted that the burden remained on Defendants here. (Pet. App. 17a-18a.) ("504(b) places on the infringer the burden of proving that the revenues are not attributable to the infringement. . . ."); *see also Konor*, 878 F.2d at 140 (observing that

(Cont'd)

Plaintiff claims that the Fourth Circuit's holding that Section 504(b) provides only an initial presumption "eviscerates" the plain meaning of Section 504(b). (Pet. at 16.) To this end, Plaintiff argues (without a single citation) that the presumption afforded by Section 504(b) automatically creates a "statutory attribution," a material issue of fact that cannot be overcome and that can only be decided following a trial by jury. (Pet. at 17.) Plaintiff's argument simply ignores that summary judgment is an integral part of the Federal Rules intended to provide for the just, and speedy determination of factually unsupported claims. Indeed, this Court has stated that

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'

Celotex Corp. v. *Catrett*, 477 U.S. 317, 327 (1986) (citations omitted). As the Fourth Circuit explained, "[Section 504(b)] does not exempt the copyright plaintiff from the requirement of Rule 56 that he respond to a properly supported motion for summary judgment" by setting forth specific evidence showing a genuine issue of material fact. (Pet. App. 15a.)

(Cont'd)

Section 504(b) explicitly allocates the burden of proof to the defendant in connection with a successful copyright plaintiff's claim for profits). However, summary judgment is regularly granted to parties bearing the burden of proof. Fed. R. Civ. P. 56(a); *Drewitt* v. *Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993).

Plaintiff wrongly claims that the Fourth Circuit "conflated" the burden to present proof identifying the lines of revenue related to Defendants' use of the Flying B Logo with those "concerning the burden to demonstrate the absence of a causal connection between the infringement and the revenue." (Pet. at 14-15.) The Fourth Circuit very clearly segregated the lines of revenue that bore a "conceivable connection" to the Flying B Logo, from those that did not. *See, e.g.*, (Pet. App. 18a.) As for those lines of revenue that bore a conceivable connection to the Flying B Logo, the Fourth Circuit plainly held that the burden was on the Defendants to prove that such revenue was not attributable to Defendants' use of the Flying B Logo.

If anything, it is Plaintiff, rather than the Fourth Circuit, who is guilty of improper "conflation." Specifically, Plaintiff has attempted to support his Petition by "conflating" his burden of proving the existence of a genuine issue of material fact to survive a summary judgment motion with the allocation to Defendants of the burden of proving that factors other than the infringement contributed to profits under Section 504(b). (Pet. at 14-15.) The Defendants offered proof that there was no disputed issue of material fact with respect to certain remote revenue streams claimed by Plaintiff, which in time-honored fashion shifted the burden to Plaintiff to show that an issue of material fact did exist. (Pet. App. 21a) (citing *Matsushita Elec. Indus. Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). In the end, Plaintiff's claims of conflict among the Circuits and "conflation" by the Fourth Circuit is a transparent attempt to conceal his failure to present any proof warranting a trial under Section 504(b).

B. The District Court's Jury Instructions Adequately Informed The Jury of the Controlling Law

The District Court's jury instructions are not an appropriate subject for this Court's review as they do not present a Circuit conflict, a conflict with this Court's precedent or a matter of grave concern.

While Plaintiff claims Judge Widener found error in the District Court's interpretation of controlling law, (Pet. at 20), Judge Widener actually claims only an abuse of discretion, not an error of law, in the District Court's failure to include a specific charge given to the jury in *Walker* that profits should be deemed attributable to the infringement unless the defendant proves otherwise. *Walker*, 28 F.3d at 414.

The "omission" of this specific charge from *Walker* is, at worst, decidedly harmless, as the District Court consistently and repeatedly made it clear to the jury that Defendants bore the burden of proof as to the apportionment of any profits. The panel majority correctly observed that the District Court instructed the jury no less than four times[13] that Defendants bore the burden, and the dissent agreed that the jury was appropriately instructed on this point.

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13. (Pet. App. 24a) ("*See, e.g.*, J.A. 563-65 (stating to jury, at the outset of trial, that '[i]n this case, the burden of proof is on the *defendants* to prove the extent to which the revenue derived from the sale of these products is attributable to factors other than the artwork of the Flying B logo' . . .) J.A. 903 (instructing jury immediately prior to deliberations that '[t]he case is about whether on the evidence the defendants [who have the burden of proof] have carried their burden of proof . . . On those questions the *defendants* have the burden of proof by a preponderance of the evidence.') (emphasis added)")

(Pet. App. 24a) ("[T]he court made it eminently clear in its instructions that the Ravens were obliged to shoulder the burden of proof."); (Pet. App. 28a) (dissent in accord).[14] The Court also provided a detailed explanation of the meaning of this burden, and that if Defendants did not satisfy it, Plaintiff would prevail. (JA 912-13 ("[A]s stated in each question, the defendants have the burden of proof by a preponderance of the evidence . . . if the scale tips even a little bit for the plaintiff, the defendants have not carried the burden of proof.").) In short, the substance of the *Walker* charge was employed although given in a different form better suited to the circumstances of this case.

The trial court also addressed the First Circuit's concerns regarding the jury instructions at issue in *Data General Corp.* v. *Grumman Sys. Support Corp.*, 36 F.3d 1147 (1st Cir. 1994). In *Data General*, the First Circuit was concerned that the district court instructed the jury to include among infringer's profits those revenues attributable to the infringement without providing the jury with the proper sufficient context on how to conduct the apportionment. *Id.* at 1173-77. Unlike in *Data General*, the District Court here provided a richly detailed set of instructions that provided the jury sufficient context to consider the issues, including a definition of "attribution" to ensure clarity. In sum, there is no conflict whatsoever.

Accordingly, Plaintiff has failed to present a compelling reason for this Court to grant the Petition with respect to the jury instructions.

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14. This point was further emphasized on the verdict form. Each of the questions on the form asked whether "Defendants [had] proven, by a preponderance of the evidence" the issue in dispute. (Pet. App. 118a-119a.)

CONCLUSION

For the reasons set forth above, Defendants respectfully submit that the Petition should be denied.

Respectfully submitted,

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